

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 604

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ET AL, APPELLANTS,

vs.

MISSOURI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

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[fol. 1]

**IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI**

PETITION FOR INJUNCTION

Comes now the State of Missouri, in its sovereign right, by Thomas F. Eagleton, as Attorney General for the State of Missouri, acting in that behalf, and informs the Court and charges as follows:

1. That the defendant Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter sometimes referred to as "The Union," is and was an unincorporated voluntary association of persons with headquarters and offices at 913 Tracy Avenue, in the City of Kansas City, Missouri, and is usually and commonly known as a labor union or labor organization.

2. That at all material dates the following defendants were holders of official positions in Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, as follows:

Loren Hargus, President, Pearl R. Finch, Vice President, James L. Grimes, Financial Secretary-Treasurer, Lorrain B. Firkins, Recording Secretary, James Smirl, First Warden, Delbert H. Lord, Second Warden, Victor H. Stueve, First Conductor, Earnest E. O'Neill, Second Conductor, Wm. V. Mitchell, First Sentinel, Oliver D. Pace, Second Sentinel, Edward J. Arens, Correspondent, Lewis A. Copple, Executive Board Member, Lester F. Parker, Executive Board Member, James T. Strohm, Executive Board Member, Donald Rigby, Executive Board Member, and Vincent [fol. 2] Anello, Steward; that defendants Loren Hargus, Lewis A. Copple, James T. Strohm and Donald Rigby are members of the Union Negotiating Committee of said Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America; that the aforementioned individual defendants will hereinafter sometimes be referred to as "Officers."

3. That at all material dates herein the defendants Wm. K. Boland, Frank E. Brown, Herbert Lee Brown, A. F. Clark, Kenneth B. Hood, Carroll R. Lollard, Loyd A. Dailey, Earl Thomas Denyer, Joseph M. Eitel, Harold L. Ellis, James Clifford Fisher, Robert Lee Fravel, Robert Donald Goforth, John G. Hall and Orville George Halley were employees of Kansas City Transit, Inc., and members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America.

4. That all of the employees in the State of Missouri of the Kansas City Transit, Inc., who are members of and affiliated with said Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America had and have a joint and common interest in the labor dispute, strike and work stoppage, hereinafter referred to as the persons and individuals specifically named as defendants herein, that the employees of Kansas City Transit, Inc., who are members of and affiliated with said Division 1287 of the Amalgamated Association [fol. 3] tion of Street, Electric Railway and Motor Coach Employees are too numerous in number to be made parties to this action; and the persons and individuals specifically named as defendants herein are also sued as representatives of and for and on behalf of all employees of Kansas City Transit, Inc., who are and were members of and affiliated with defendant Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America as an adequate representation of all of said employees and members; said defendant employees will hereinafter sometimes be referred to as "the employees,"

5. That defendant Loren Hargus has and maintains his place of residence at 5734 South Benton, Kansas City, Missouri.

6. That Kansas City Transit, Inc., above named, and hereinafter sometimes referred to as "The Company," is and was at all material dates a corporation organized and existing by virtue of the laws of the State of Missouri, under governmental franchise issued and authorized by the laws of said state, transacting the business of a public util-

ity and furnishing a form of transportation in the state of Missouri to the public generally in the city of Kansas City, Missouri, and in Jackson and Clay counties, Missouri, by means of motor busses, and so engaged was and is furnishing a life essential as described and referred to by Chapter 295 of the Revised Statutes of Missouri, 1959; that at all material dates and in the business of furnishing the transportation aforesaid, said Kansas City Transit, Inc., owned, operated, or had in use, approximately 401 motor busses operating over 415 round-trip miles of streets and road in the city of Kansas City, Missouri, and in Jackson and Clay counties, Missouri, and said Kansas City Transit, Inc., by such motor busses, furnished transportation service to approximately 100,000 passengers per day within the state of Missouri.

7. That at and prior to all material dates herein, said Kansas City Transit, Inc., employed in the business of furnishing the transportation service aforesaid and in the transaction of its business as a public utility within the state of Missouri approximately 958 persons, 817 of whom are and were members of the defendant union, Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, and of and among said employees were each and all of the persons and individuals named as defendants herein, and all of such employees of Kansas City Transit, Inc., affiliated with said union, including the persons and individuals named as defendants herein, and on all material dates in this petition set out or referred to, are and were engaged and participating in a labor dispute, work stoppage and strike hereinafter referred to.

8. That the work and labor done and performed by the employees was done and performed as a part of the transportation service furnished by The Company and was done and performed within the state of Missouri.

9. That on November 13, 1961, the members of the defendant union who are employees of The Company did vote to cease to work for and on behalf of The Company and to go out on strike as against employment by and performing

work for and on behalf of The Company in furnishing said transportation service in the state of Missouri unless agreement was reached in the labor dispute then existing between The Company and The Union and its members.

10. That no agreement had been reached between The Union and The Company on November 13, 1961, and that by reason of the threatened strike and work stoppage against The Company by the members of The Union aforesaid, which threatened strike and work stoppage threatened to impair and interrupt the effective operation in the state of Missouri of The Company as a public utility in furnishing public transportation service, John M. Dalton, as Governor of the State of Missouri, on the 13th day of November, 1961, by virtue of the authority of Chapter 295 of the Revised Statutes of Missouri, 1959, and particularly Section 295.180 thereof, did issue his Proclamation, a copy of which is attached hereto as Exhibit A and made a part hereof.

11. That on the same day, to wit, November 13, 1961, John M. Dalton, as Governor of the State of Missouri, by [fol. 6] virtue of the authority of Chapter 295 of the Revised Statutes of Missouri, 1959, and particularly Section 295.180 thereof, did issue his Executive Order No. 1, a copy of which is attached hereto as Exhibit B and made a part hereof.

12. That on the 13th day of November, 1961, said John M. Dalton, Governor of the State of Missouri, under and by virtue of the authority vested in him by the Constitution of Missouri and statutes thereof, including Section 295.180 of the Revised Statutes of Missouri, 1959, in order to insure a continuation of the operation of the transportation service theretofore operated by The Company, aforesaid, in the state of Missouri and because of the threatened strike and work stoppage by the employees of The Company as stated and set forth in paragraphs 9 and 10 hereof, did take immediate possession of the plants, equipment and facilities of said Kansas City Transit, Inc., for the use and operation thereof by the State of Missouri in the public interest.

13. That upon taking possession of the plants, equipment and facilities of The Company by John M. Dalton, Governor

of the State of Missouri, the employees and defendants herein have continued the labor dispute aforesaid, and on November 14, 1961, said employees and defendants herein failed and refused, and still fail and refuse, to perform work or labor for and on behalf of the State of Missouri in the furnishing of the transportation services aforesaid through [fol. 7] the plants, equipment and facilities of The Company to the patrons of said company and to the people generally in the state of Missouri; that thus and thereby has been caused an actual interruption of the operation of the transportation services, as aforesaid, of the public utility, Kansas City Transit, Inc.; that the interruption of the furnishing of such transportation services through the plants, equipment and facilities of The Company and the refusal of the employees to perform work and labor for and on behalf of the State of Missouri in the furnishing of such transportation service has jeopardized and threatened the public interest, health and welfare of the state of Missouri and of the inhabitants thereof.

14. That the employees, including the named individual defendants herein, The Union and The Officers, have incited, supported and participated in, as a joint and common cause, the work stoppage and strike aforesaid and refusal to work for and on behalf of the State of Missouri in furnishing the transportation service aforesaid through the plants, equipment and facilities of The Company, and that said employees, officers and union will continue to incite, support and participate in said work stoppage and strike aforesaid unless restrained and enjoined by the order and judgment of this Court.

15. That Chapter 295 of the Revised Statutes of Missouri, 1959, and especially Section 295.200, makes such [fol. 8] action on the part of the union and officers in calling, inciting, supporting and participating in said strike and concerted refusal to work for the State of Missouri unlawful.

Wherefore, the State of Missouri, named as plaintiff herein, in its sovereign right, prays the Court:

(1) That, upon the filing of this petition in this Court, this Court issue its temporary restraining order restraining and enjoining the defendant union, officers and employees, including the individually named defendants herein and all persons in active concert or participation therein, pending the further order of this Court, from continuing, inciting, supporting and participating in the work stoppage, refusal to work and the strike aforesaid against the State of Missouri or Kansas City Transit, Inc.

(2) That, with or without issuing its temporary restraining order as prayed above, and with or without an order to show cause, this Court issue its temporary injunction restraining and enjoining the defendant union, officers and employees, including the individually named defendants and all persons in active concert or participation therein, from doing any of the things mentioned in paragraph 1 of this prayer, and further ordering the defendant employees to perform the work and labor necessary for and on behalf of the State of Missouri, through the plants, equipment and facilities of Kansas City Transit, Inc., to continue and furnish the transportation service aforesaid, as furnished [fol. 9] by Kansas City Transit, Inc., until the further order of this Court and that all and every person, their agents, servants and attorneys, be enjoined and restrained from in anywise interfering with said employees in the performance of said duties to and through the State of Missouri.

(3) That upon final hearing of this cause, this Court permanently restrain and enjoin the defendants and other persons above mentioned from doing any of the things mentioned in paragraph 1 of this prayer, and further order the defendant employees to perform the work and labor necessary for and on behalf of the State of Missouri, through the plants, equipment and facilities of Kansas City Transit, Inc., to continue and furnish the transportation service as aforesaid, as furnished by Kansas City Transit, Inc., and that all and every person, their agents, servants and attorneys, be permanently enjoined and restrained from in anywise interfering with said employees in the performance of said duties to and through the State of Missouri.

(4) Plaintiff prays for such other and further relief in the circumstances as may be just and proper.

IN THE CIRCUIT COURT OF JACKSON COUNTY

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE
—November 15, 1961

Upon presentation to the Court of the verified petition of the plaintiff in the above-entitled cause, it is hereby Ordered that the defendants in the above-entitled cause show cause on the 27th day of November, 1961, at 1:30 o'clock, P.M., why a temporary injunction should not be granted as prayed in the petition in said cause, and

It Is Further Ordered that until the determination of this Court upon this order to show cause whether a temporary injunction shall issue, the defendants in the above-entitled cause, and all persons in active concert or participation therein, are hereby enjoined and restrained from continuing, inciting, supporting and participating in any work stoppage, refusal to work and strike against the State of Missouri or Kansas City Transit, Inc.

It Is Further Ordered by this Court that a copy of this Order, duly certified by the Clerk, be served upon the defendants in said cause.

Dated this 15th day of November, 1961.

J. Donald Murphy, Judge of the Circuit Court.

[fol. 12]

TRIAL

Be It Remembered that on Monday, November 27, 1961, the above entitled cause came on for hearing before the Honorable J. Donald Murphy, Judge of Division No. Eleven of the Circuit Court of Jackson County, Missouri, at Kansas City.

The Plaintiff was represented by counsel Messrs. Gordon Siddens, First Assistant Attorney General, and Julian L. O'Malley, Assistant Attorney General.

The Defendants were represented by counsel Messrs. Bernard Dunau and John J. Manning.

IN THE CIRCUIT COURT OF JACKSON COUNTY

MOTION TO DISMISS—Filed November 27, 1961

Now comes Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter referred to as "Amalgamated", Loren Hargus, Pearl R. Finch, James L. Grimes, Lorrain B. Firkins, James Smirl, Delbert H. Lord, Victor H. Stueve, Earnest E. O'Neill, Wm. V. Mitchell, Oliver D. Pace, Edward J. Arens, Lewis A. Copple, Lester F. Parker, James T. Strohm, Donald Rigby, Vincent Annello, Wm. K. Boland, Frank E. Brown, Herbert Lee Brown, A. F. Clark, Kenneth B. Hood, Carroll R. Lollard, Loyd A. Dailey, Earl Thomas Denyer, Joseph M. Eitel, Harold L. Ellis, James Clifford Fisher, Robert Lee Fravel, Robert Donald Goforth, John G. Hall, and Orville George Halley, defendants in the [fol. 13] above entitled cause, and state that Amalgamated is the collective bargaining agent of certain of the employees of the Kansas City Transit, Inc. in accordance with a certification issued by the National Labor Relations Board in Case No. R-4705, which certification was issued pursuant to an election held following a National Labor Relations Board Order and Decision reported at 47 N.L.R.B. 1. At the time of the issuance of the certification the name of the employer was Kansas City Public Service Company which name has now been changed to Kansas City Transit, Inc. Pursuant to said certification, defendant Amalgamated is and at all times material hereto has continued to be the exclusive collective bargaining agent of said employees of Kansas City Transit, Inc.

The defendants move to dismiss the petition filed herein by plaintiff for the following reasons:

1. Kansas City Transit, Inc., hereinafter referred to as the "Company", is a public utility providing passenger transportation service for hire by motor vehicle in and between points in the Kansas City, Mo.-Kansas City, Kansas metropolitan area under certificates of convenience and necessity issued by the Interstate Commerce Commission and by the States of Missouri and Kansas. The Company is an employer engaged in interstate commerce and in ac-

tivities affecting commerce within the meaning of the Labor-[fol. 14] Management Relations Act, 1947, and is subject to the jurisdiction of the National Labor Relations Board, which has asserted and exercised jurisdiction over it.

2. The defendant Amalgamated in its relations with the Company as the collective bargaining agent of certain employees of said Company is and at all times material hereto has been subject to all of the provisions of the Labor-Management Relations Act, 1947.

3. The defendants state that Chapter 295, Revised Statutes of Missouri, 1949, and especially Sections 295.180 and 295.200 of said Chapter 295 are unconstitutional and invalid and all actions taken thereunder by the Governor of Missouri and Daniel C. Rogers are unlawful, invalid and without any force or effect for the reasons herein set forth and are in derogation of the rights, privileges and immunities granted to all members of the defendant Amalgamated and guaranteed by the Constitution of the United States in Article I Section 8 and Article VI of said Constitution, and the Thirteenth and Fourteenth Amendments of the Constitution of the United States:

(a) Chapter 295, R. S. Mo., 1949, is in conflict with the Labor-Management Relations Act, 1947, and therefore is unconstitutional and invalid because it violates Section 8 of Article I and Article VI of the Constitution of the United States.

[fol. 15] (b) Chapter 295, R. S. Mo., 1949, is in conflict with the National Labor Relations Act and the Labor-Management Relations Act of 1947 and interferes with the purposes of said Acts to promote voluntary labor agreements through free collective bargaining.

(c) Section 295.200 of said statute, which makes it unlawful for employees of public utilities to strike, is in conflict with the Labor-Management Relations Act of 1947 and Section 7 and Section 13 thereof, and is in violation of Article VI and Article I, Section 8 of the Constitution of the United States.

(d) Section 295.180 of said Law, providing that a public utility may be seized on the terms and conditions therein set

forth is in conflict with the Labor-Management Relations Act, including but not limited to Section 7 and Section 13 thereof.

(e) Sections 295.120 to 295.170, inclusive, R. S. Mo., 1949, providing for public hearing panels is in conflict with the Labor-Management Relations Act of 1947.

(f) Section 295.200 of said Revised Statutes of Missouri, 1949, providing penalties for employees who strike in economic strikes and penalizing public utilities which refuse to bargain collectively in good faith with employees, is in conflict with and in violation of the National Labor Relations Act, including, but not limited to Sections 2(3), 7, 8 and 13 [fol. 16] of said Labor-Management Relations Act of 1947, and attempts to legislate on a subject and in an area fully preempted by Federal law.

(g) Chapter 295.090, R. S. Mo., 1949, constitutes a denial of the right of free collective bargaining by utility employees through representatives of their own choosing, and is unconstitutional and void under Article I Section 8 and Article VI of the Constitution of the United States as being in conflict with the Labor-Management Relations Act.

(h) Section 295.200(1), R. S. Mo., 1949, by its terms, substance and effect, is void on its face and violates the provisions of the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States, and is a denial of freedom of speech and freedom of assemblage and equal protection of the laws, and a provision of involuntary servitude in violation of said Constitution.

(i) Section 295.090, R. S. Mo. 1949, by its terms, substance and effect, is void on its face and violates the provisions of the Fourteenth Amendment of the Constitution of the United States and is in conflict with the Labor-Management Relations Act of 1947.

(j) Section 295.200, R. S. Mo., 1949, violates the provisions of the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States and is in conflict with the provisions of the Labor-Management Relations Act, 1947.

[fol. 17] (k) Section 295.200, R. S. Mo., 1949, is a denial of freedom of speech, freedom of assemblage and equal protection of the laws; the penal provisions thereof provide for imposition of excessive fines and the terms and substance thereof impose a form of compulsory service or involuntary servitude.

(l) Said Section 295.200(2), R. S. Mo., 1949, is an attempt to take property without due process of law, interferes with the freedom of contract and denies to all employees of utilities the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

(m) Chapter 295, R. S. Mo., 1949, is in conflict with various provisions of the National Labor Relations Act, as amended, and the Labor-Management Relations Act of 1947, as amended, in that it attempts to deny and take away rights guaranteed by Sections 2(3), 7, 8 and 13 and other provisions of said Acts.

(n) Chapter 295, R. S. Mo., 1949, is unlawful and invalid in its entirety, because it attempts to legislate and operate in a field and cover activities fully preempted by and covered by existing Federal law enacted by Congress pursuant to authority of the Constitution of the United States.

(o) Chapter 295, R. S. Mo., 1949, is unlawful and invalid because as applied to the defendants and the operations [fol. 18] of the Company it attempts to directly regulate an interstate operation and is, therefore, in violation of Article I Section 8 of the Constitution of the United States.

(p) Chapter 295, R. S. Mo., 1949, is invalid and in conflict with Article I Section 8 of the Constitution of the United States because by such legislation the State of Missouri seeks to give this statute extra-territorial effect through the method of seizure of operations of the Company in the State of Kansas and in and between the State of Kansas and the State of Missouri.

Wherefore, defendants move to dismiss plaintiff's petition herein at plaintiff's cost.

[fol. 19]

IN THE CIRCUIT COURT OF JACKSON COUNTY

Statement of Evidence—November 27, 1961

Defendants' Evidence

PRESTON JENISON was duly sworn:

Direct examination.

By Mr. Dunau:

Q. Mr. Jamison, what is your position, sir?

A. First let me correct. My name is Preston Jenison (spelling) J-e-n-i-s-o-n. I am Vice-President of the Kansas City Transit.

Q. How long have you held that position, sir?

A. I was appointed Vice-President the first of November, 1961.

Q. What previous position have you held with the company?

A. Prior to that time I have been Director of the Transportation Department for about two years and prior to that since 1957 Director of Traffic and Schedule Department. I have been with Kansas City Transit about 32 years.

Q. Thank you, sir.

A. I would like to say in this connection I am appearing here at the request of both parties. The Kansas City Transit is not a party to these matters.

Q. Was the Kansas City Transit, Inc., previously known as the Kansas City Public Service Company?

A. Yes, sir.

Mr. Siddens: Your Honor, I am now going to formally object to any testimony offered in support of defendants' motion to dismiss.

The Court: Overruled.

[fol. 20] By Mr. Dunau:

Q. The answer was yes, sir?

A. Yes.

Q. Did that change of name come about May 25, 1960 approximately?

A. Approximately that.

Q. Now, the business entity which is now known as Kansas City Transit, Inc., is the same business entity as was formerly known as Kansas City Public Service Company, is that correct?

A. Yes, it is the same, merely a change of name.

Q. Is the company chartered by the State of Missouri?

A. We have a certification that was originally issued to the Kansas City Public Service Company and has been transferred to Kansas City Transit.

Q. The company is a Missouri corporation?

A. Missouri corporation, yes, sir.

Q. Does it have its principal office and place of business in Kansas City, Missouri?

A. It does.

Q. Does the company transport passengers by bus in the States of Kansas and Missouri?

A. It does, in Kansas and Missouri.

Q. Does it operate under a Certificate of Convenience and Necessity issued by the United States Interstate Commerce Commission?

A. That I can't—I can't answer that. I don't know.

Q. Does it operate under a Certificate of Convenience [fol. 21] and Necessity issued by the Public Service Commission of Missouri?

A. Yes.

Q. Does it operate under a Certificate of Convenience and Necessity issued by the Kansas State Corporation?

A. I believe that it does.

Q. Can you describe for us the different parts of the operation which the respective certificates cover? Why the two certificates?

A. We have some lines that operate exclusively, one line that operates exclusively in the State of Kansas; we have certain lines that operate exclusively in the State of Missouri; and then the rest of the lines are interstate operating between both states. The Missouri certification would govern our operations wholly within the State of Missouri and the Kansas certification those wholly in the State of

Kansas. Now, those Commissions also have jurisdiction over our affairs, rates and tariffs in their respective states.

Q. Would it refresh your recollection if this is the fact that because of your Interstate Commerce Commission transportation of passengers you also have a Certificate of Convenience and Necessity from the United States Interstate Commerce Commission?

A. I can't answer that definitely because I don't know the facts on that.

[fol. 22] Q. Very well, sir. Do you know the approximate passenger revenue during the year 1960 that the company received?

A. Approximately eight million six hundred thousand.

Q. Would the same ratio of receipts have prevailed during the year of 1961?

A. Approximately the same. They are down slightly.

Q. Now, taking the passenger revenue for the year 1960, can you tell us what percentage of that revenue is derived from transporting passengers wholly within the State of Missouri?

A. Wholly within Missouri is approximately 77 per cent.

Q. And what percentage of passenger revenue is derived from transporting passengers wholly within Kansas?

A. Wholly within Kansas is about 7 per cent.

Q. And approximately what percentage of the revenue is derived from transporting passengers between Missouri and Kansas?

A. That would be approximately 15 per cent. The difference would be in dropping the decimals on the 77 and 7.

Q. Well, approximate is quite sufficient for our purposes I am sure.

A. Approximate.

Q. What is the average number of passengers that are carried by the company in the course of a day?

A. On the total system it is approximately 150,000 on a normal work day.

Q. Now, of this number of 150,000 how many travel exclusively to and from points within Missouri?

[fol. 23] A. Within Missouri it is approximately 100,000.

Q. And of this 150,000 how many passengers travel exclusively to and from points within Kansas?

A. That would be that percentage, I haven't calculated it, a little in excess of 7,000 as I calculate it.

Q. 7,000?

A. Yes, sir.

Q. And I take it that would mean there would be 43,000 passengers that travel from points between Missouri and Kansas, is that correct, sir?

A. Approximately that, yes, sir,—wait a minute, maybe my calculations, let me calculate this again.

Q. Sure.

A. May I ask a question? Mr. Banhart has some figures here.

Mr. Jenison: Do you have those figures?

Mr. Banhart: I didn't quite understand.

Mr. Jenison: The distribution, the 100,000 passengers within the State of Missouri, how many passengers within the State of Kansas and how many passengers interstate?

Mr. Banhart: Per day?

Mr. Jenison: Per day.

Mr. Banhart: Well, I am not sure of the 100,000 being absolutely in Missouri, I think our revenue is around twenty-six thousand, average twenty-six thousand dollars a day, that we had something in excess of a hundred thousand in toto, exactly what, I don't know; then 7 per cent of that [fol. 24] would be Kansas.

Mr. Jenison: We have two types of passengers, revenue passengers and total passengers are two different items. Are you asking about the revenue passengers or total passengers?

By Mr. Dunau:

Q. Would you explain the difference?

A. The difference, we have so many revenue passengers, then we have a transfer ratio of about 40 per cent. Some people use more than one line to complete their trip so the total passengers is higher than the total individual persons.

Q. What I would be interested in, sir, is the total passengers and a break-down of those total passengers in to the number who travel exclusively within Missouri, the number who travel exclusively within Kansas and the num-

ber who travel interstate between Missouri and Kansas and as I understood it you gave me as a total 150,000 for the total number of passengers.

A. Total system.

Q. For the total system of which 100,000 travel exclusively to and from points within Missouri approximately?

A. I think Mr. Banhart here has the figures.

(Colloquy outside the record.)

The Witness; Well, that's approximately then 10,500 within the State of Kansas, a 115,000 in the State of Missouri, and that would leave then approximately twenty-four [fol. 25] twenty-five thousand interstate, if my calculations are correct.

By Mr. Dunau:

Q. Let me see if I understand you, sir. There are total passengers in the system of 150,000?

A. That is correct.

Q. 115,000 travel exclusively within Missouri?

A. Within Missouri, yes, sir.

Q. 10,500 travel exclusively within Kansas?

A. That's correct.

Q. 24,500 travel interstate from points in Kansas to points in Missouri or vice versa?

A. Yes, those are the facts.

Q. Sir, what are the total route miles which are covered by the passenger transit system of the company?

A. Our total round trip miles are approximately 496 miles.

Q. Of this 496 miles how much of that is on routes devoted only to travel within Missouri?

A. The route miles in Missouri are approximately 415.

Q. And what are the route miles exclusively within Kansas, sir?

A. In Kansas they are approximately 81.

Q. Now, can you tell us how many of your route miles are continuous routes between Kansas and Missouri?

A. Now, I don't quite understand your question.

Q. Well, you gave me 415 miles wholly within Missouri.

A. Yes.

[fol. 26] Q. And 81 miles wholly within Kansas, which would make 496 miles which you gave me as the total of the round trip route miles in the system?

A. Yes.

Q. Now, what I would like to know is how many of the company's routes begin in Kansas, are continuous routes through Kansas into Missouri and terminate in Missouri, and how many begin in Missouri, are continuous through Missouri into Kansas and terminate in Kansas.

A. It appears we have 10 lines which would be interstate lines. We have one terminal in Missouri and one in Kansas, the other end in Kansas, 10 lines.

Q. Do you know the mileage of those 10 lines, sir?

A. I don't have that figure separated. I have something here which possibly I can get it from. Now, those miles in Kansas, that would be the 81 miles, round trip miles in Kansas.

Q. Now, sir, what I am—

A. Well, those are all the lines. Now, I will have to add them up here. If my calculation is correct it is approximately 150 round trip miles. That's the lines that operate interstate.

Q. That is correct, sir. Thank you, sir. Now, can you give me the approximate mileage of the routes which operate exclusively in Kansas?

A. We have the one route that is exclusively in Kansas which is the 7th—Parallel line which is 16.78 miles a round [fol. 27] trip.

Q. Do you have a Grand—Central route which operates exclusively in Kansas on nights, Sundays and holidays?

A. Nights, Sundays and holidays it operates exclusively within the State of Kansas.

Q. Is that 10.8 miles round trip, sir?

A. That's the mileage from Missouri to Kansas, I believe. I think the mileage at night would be something less than that. I don't believe I have that figure.

Q. All right. Do you have another route, 27th Street and 3rd Street which operates mid-day exclusively in Kansas?

A. Yes.

Q. Do you have a fourth route, 12th Street—Argentine, which operates exclusively in Kansas on Sundays, holidays and nights?

A. The Argentine portion of it, yes.

Q. The Argentine portion of it operates exclusively within Kansas?

A. That is correct.

Q. Now, can you finally give us the approximate round trip route miles operated exclusively in Missouri?

A. Well, let's see, we have the 496—exclusively in Missouri—you want exclusively in Missouri?

Q. That's correct, sir.

A. What are you asking for different than the 415?

Q. The 415 I take it includes routes which begin in Missouri [fol. 28] but which also terminate in Kansas?

A. Well, then, we would take the 150 from the 415 less the 81, which would be 184 miles.

Q. Of route exclusively within Missouri?

A. Exclusively in Missouri. Now, that's taking out the interstate lines, that's taking out exclusively in Kansas.

Q. That's correct, sir. I think, however,—may I suggest you may have made an error and you may wish to reconsider because you deducted 81 miles as being exclusively within Kansas and I do not think you have 81 miles exclusively in Kansas.

A. That's correct. I believe the figure should be 248.

Q. 248 then would be the figure of your round trip route miles exclusively within Missouri, is that correct?

A. Kansas City, Missouri, yes, sir.

Q. About how many bus drivers does the company employ, sir?

A. Approximately 640. That varies from day to day.

Q. Approximately how many busses does the company operate?

A. The company owns 401 busses.

Q. Can you tell us about how many of these 401 busses operate on the routes exclusively within Kansas?

A. There are eight busses scheduled on the line exclusively in Kansas. That's in the p.m. rush which is our maximum requirement.

Q. And how many busses operate on routes exclusively [fol. 29] within Missouri?

A. Within Missouri in the p.m. rush there are 234. Now, these are on a normal week-day operation.

Q. And how many busses do you operate on routes which are continuous interstate routes between Kansas and Missouri?

A. Interstate there are 104.

Q. Are the places within which the busses are garaged known as barns in the company, sir?

A. Divisions.

Q. Divisions?

A. Divisions and garages.

Q. Divisions and garages. Do the words "divisions and garages", do they mean the same thing, sir?

A. For all practical purposes, the garage is the maintenance part of it, the division is the transportation department.

Q. Now, taking the division, which is the transportation department, how many divisions are there in the company, sir?

A. We have two, one at 9th and Brighton, one at 26th and Harrison.

Q. Are those both located in Kansas City, Missouri?

A. Those are both located in Kansas City, Missouri, yes.

Q. And are all the busses which operate, wherever they operate, do they originate from one of these two divisions?

A. Yes.

Q. And do all bus drivers report for work to one of these two divisions?

A. Yes.

[fol. 30] Q. Then I understand that if a bus operates exclusively on a route within Kansas, the bus driver would have to begin his journey from the garage in Missouri and travel into Kansas in order to operate his route within Kansas, is that correct, sir?

A. Yes.

Q. And I take it the same is true with respect to interstate routes?

A. Yes.

Q. And the same is true with respect to routes wholly within Missouri?

A. Yes.

Q. About how many maintenance employees does the company employ?

A. I believe it is approximately 170.

Q. Where do these employees work? In what location, sir?

A. You mean the maintenance?

Q. The maintenance employees.

A. They work at the 26th and Harrison garage and at the 9th and Brighton and 10th and Lister shop and maintenance department.

Q. Are all these locations within Kansas City, Missouri?

A. Yes, they are.

Q. Now, is the maintenance of vehicles segregated on the basis of whether the bus will operate on a route in Kansas or on a route in Missouri or on an interstate route?

A. The busses are maintained, we don't set a certain bus number to be operated on any route; any bus could be on any route.

[fol. 31] Q. Any bus may be on any route? And I take it that means any maintenance employee can do his work on any bus, is that correct, sir?

A. So far as I understand unless there are some that are qualified only to work on a certain type engine, diesel, propane or gasoline, which I wouldn't know, but for all practical purposes as I understand it they work on any bus.

Q. About what is the total number of the employees who are represented in collective bargaining employed by the company—who are represented in collective bargaining by Division 1287?

A. I will check this with Mr. Banhart. I think that's 817.

Mr. Jenison: Is that correct?

Mr. Banhart: Yes.

Mr. Jenison: 817.

By Mr. Dunau:

Q. Do you know how many of these employees live in Missouri, sir?

A. I do not. Mr. Banhart may know.

Mr. Banhart: I don't know.

A. I don't know.

By Mr. Dunau:

Q. Would the figure 665 be approximately correct, sir?

A. I wouldn't know.

Q. Does the company charter busses to persons for their use on special occasions?

A. Yes.

Q. Do these chartered busses operate interstate, sir?

[fol. 32] A. Yes, within the commercial zone, which includes some part of Kansas.

Q. What does the commercial zone mean, sir?

A. That's a boundary, as I understand, under which we can operate without necessarily fulfilling all Interstate Commerce Commission rules and regulations for over-the-road travel.

Q. But the busses which are chartered do operate interstate?

A. Yes.

Q. Is it exclusively an interstate operation?

A. No, it is not.

Q. Can you give us a division as to approximately how much of these charters are interstate and how much would be local?

A. This would just have to be a guess. My presumption is more of it is in Missouri than interstate. That would be just be a guess on my part. I don't have those figures.

Q. What is the total revenue from the charter service?

(Colloquy outside the record.)

A. According to these figures that I see it averages about four or five thousand dollars per month.

By Mr. Dunau:

Q. That is the total revenue, is that correct, sir, from charter service?

A. From charter service.

Q. Then the break-down between interstate and local would be based on whatever—well, do you know how much of that revenue is derived from interstate?

A. No, I do not know.

[fol. 33] Q. Now, in addition to chartering service, does the company run a regular sight-seeing route?

A. No, we do not.

Q. Does the company furnish freight switching service on rail lines?

A. The company has a party who operates that service. The company itself does not operate it.

Q. Is the company empowered to operate it itself, sir?

A. I will have to check.

(Colloquy outside the record.)

A. I am not familiar with that contract.

By Mr. Dunau:

Q. Was there a time in the past when the company itself operated a freight switching service?

A. Yes, there was.

Q. When did that situation change?

A. In June, '57, 1957.

Q. And what occurred in June, 1957, sir?

A. That freight operation was taken over by another party, it was operated by another party. The Kansas City Public Service Company did not operate it as itself.

Q. It contracted with another to operate this service?

A. To operate this service, yes.

Q. And what railroads are served by this service, sir?

A. I believe they have switching connections with the Missouri Pacific and the Kansas City Southern—Frisco, [fol. 34] Missouri Pacific and Frisco, those two, I believe.

Q. Does the party with which the Kansas City Transit contracts for the operation of this service have the Certificates of Public Convenience and Necessity?

A. You will have to prove that by Mr. Banhart. I don't know.

Mr. Banhart: I am not sure, myself.

By Mr. Dunau:

Q. Do you know whether the certificates are issued to the Kansas City Transit Company?

A. That I can't answer. I would have to check on that.

Q. What revenue is derived by the Kansas City Transit Company from this contract to operate the freight switching service?

A. 10 per cent of the gross.

Q. Do you know approximately how much that would be?

A. Four or five hundred dollars per month.

Q. Can you tell us, sir, what the total expenditure in 1960 for fuel, materials and supplies, was?

A. What was that?

Q. The total expenditure for fuels, materials and supplies in 1960? Would it refresh your recollection if I told you that the annual report of the Kansas City Transit, Inc., shows that total expenditures for fuels, materials and supplies in 1960 came to \$1,456,652?

A. Yes, that is correct.

Q. \$1,456,652 is the answer to my question, sir?

A. For 1960.

Q. For 1960. Now, does approximately the same ratio of [fol. 35] expenditures prevail in the year 1961?

A. About the same amounts in '61 that they were in 1960.

Q. Can you tell us on the expenditures for fuel, materials and supplies about what percentage is derived from sources outside of Kansas and Missouri?

A. I couldn't personally answer that.

Q. Would it be very substantial?

A. It depends on the items. I don't know.

Q. Does gasoline originate in the State of Missouri?

A. I don't presume that it does.

Q. You think that gasoline would have to have an extra-state origin, is that correct, sir?

A. Yes, I believe so.

Q. Would the same be true of oil?

A. I imagine.

Q. Would the same be true of parts for the repairs of the busses?

A. That I am not certain. There might be some available here. That I don't know.

Q. Are there some that are not available here that you acquire from extrastate sources?

A. Yes.

Q. Now, of the busses which the company owns, how many were manufactured outside of Missouri or Kansas?

A. I believe they were all manufactured outside of those two states.

Q. Then they would all have to have been delivered from [fol. 36] other states to Missouri, is that correct, sir?

A. Yes.

Q. If employees are required to continue to work for the company in Missouri, can they conduct a strike confined exclusively to the company's operation in Kansas?

A. Will you restate your question?

Mr. Siddens: I am going to object to that. That seems to me to be entirely a conclusion.

The Court: If I understood the question, objection sustained.

Mr. Dunau: I can understand—I did not mean to ask for whether it is legally possible to do so. What I was directing my question to is whether it can be as a practical matter done regardless of whether it may be legal and permissible.

Mr. Siddens: I still think that that is improper.

The Court: I think you better phrase your question again, unless you wanted it stated that way.

Mr. Manning: I think, Your Honor, what he is attempting to show is still the effect on commerce. In other words, a bus going across the Intercity Viaduct for example into Kansas, can the bus driver strike at that moment as soon as he gets in Kansas or would it be physically and practically possible.

The Court: You are asking the witness as an expert [fol. 37] whether it can be done?

Mr. Dunau: Yes, based on the witness' knowledge of the operation of the company can the employees strike the operation in Kansas while continuing to work in Missouri.

Mr. Siddens: If Your Honor please, that is wholly im-

material to any issue here. The question here is the injunction on the seizure by the Governor of the State of Missouri and it is not a question of striking here against the company, and the seizure does not have any extra territorial effect at all. It only applies to the State of Missouri and the facilities in the State of Missouri.

Mr. Dunau: Our legal position on this question, Your Honor, would be that necessarily the injunction that would be issued by the Court, if one were issued, would require a strike to cease in Kansas as well as Missouri, and for that reason it can't, the Missouri statute has extra territorial effect and for that—

Mr. Siddens: Calling for a conclusion. Obviously this Court and the Governor of the State of Missouri cannot have any effect outside of the State of Missouri.

Mr. Manning: I may say to Your Honor you did issue an order which ran into the State of Kansas by the fact that it prohibited the strike on the Kansas City Transit Company's operations.

The Court: I think I understand what you are driving [fol. 38] at. I do not think you phrased it properly. You are asking him as an expert, the practical effect on the operation of the busses as a result of the restraining order—I think you better ask it again.

Mr. Dunau: Let me try again.

By Mr. Dunau:

Q. As a practical matter, with your knowledge of the operations of the company, can employees engage in a strike directed to the operation in Kansas without also interrupting service in Missouri?

Mr. Siddens: If Your Honor please, we object to that as calling for a conclusion of the witness.

The Court: Overruled.

Mr. Siddens: We also object to it on the grounds that it seeks to try to show that the order of the Governor and the order of this Court has some effect outside the State of Missouri and, of course, it is manifest that it cannot possibly have such effect and that assumes that situation. We think that is improper.

Mr. Dunau: I think it is quite clear that if it were to have extra territorial effect the concession is that it would be unconstitutional and we are attempting to establish by record here that it necessarily must have extra territorial effect whatever the—

Mr. Siddens: Of course, that's exactly the point. There is no reason under the sun, we must insist that there is [fol. 39] no reason under the sun why the operation can't stop at the state line as far as we are concerned, and the Governor of the State of Missouri and this Court certainly is not trying to operate outside, or undertaking to do anything outside of their jurisdiction.

The Court: I have overruled the objection.

By Mr. Dunau:

Q. Was there answer to that question, sir?

The Witness: May I talk to my personal counsel, Your Honor?

The Court: Yes.

(Colloquy outside the record.)

The Witness: In answer to your question, I will read the telegram Mr. Eyer sent to the Governor upon receipt of the proclamation and seizure orders: "In accordance with your proclamation and executive orders numbers 1 and 2"—this is addressed to the Honorable John M. Dalton, Governor of the State of Missouri—"in accordance with your proclamation and executive orders numbers 1 and 2 issued this date, copies of which have been delivered to me by Mr. Daniel C. Rogers, the plant's equipment and all facilities of Kansas City Transit, Inc., in the State of Missouri will be made available for use and operation by the State of Missouri in the public interest effective at 11:59 p.m. this date. A copy of this telegram has been delivered to Mr. Daniel C. Rogers, your designated agent." [fol. 40] Signed "D. D. Eyer, President, Kansas City Transit, Inc."

Now, what transpired beyond that, I think would be a matter that the Union would set whether they were going to—

By Mr. Dunau:

Q. Mr. Jenison, if a bus driver is operating an interstate route originating in Missouri with the destination in Kansas, can he stop his bus at the Missouri line and state, "From this point forward I am on strike"?

A. I don't—that would be up to him. I don't know that I could answer that.

Q. Could he stop that, could he fail to make the return trip on that bus and still not be striking in Missouri?

A. I don't know.

Q. The answer is you don't know?

A. Yes.

Q. Can he take passengers aboard that bus without informing them that he is stopping at the state line?

A. What information he would give passengers boarding, I have no way of telling.

Q. Would the company permit him, when passengers get on the bus, to say, "This bus goes up to the state line but not into Kansas"?

A. Well, that, of course, you are raising a question. I don't know what the operations would be if we had a situation that involved that question.

Q. Can maintenance employees segregate their work so [fol. 41] that busses are maintained, those busses are maintained which will operate in Missouri but those busses which will operate interstate or in Kansas will not be maintained?

A. You mean—I don't know that, what the arrangements would be, how the busses would be set up exclusively for one state or another. They might. I don't know how they would do that.

Q. With respect to routes wholly within Kansas, is there any way that the bus driver could refuse to take his bus out of the garage which is in Missouri and state, "I am not operating this bus because it is expected to be operated in Kansas"?

A. That would be a determination he would have to make, whether he crossed the picket line at the division or not.

Q. Can there be a picket line so long as an injunction is outstanding enjoining a strike of the Kansas City Transit Company?

A. I can't answer that.

Q. What other means of transportation are available to people in Kansas City, Missouri, transportation other than bus transportation?

A. Transportation other than bus transportation?

Q. That's right.

A. Private automobiles, taxicabs, and so forth.

Q. Do the schools operate a bus service by which children [fol. 42] get to school?

A. There are school busses operated, now whether—I don't believe the schools operate them, I believe they are privately operated but there are school busses in some areas.

Q. Did a two-day strike occur in November against the Kansas City Transit?

A. Yes.

Q. Are you familiar with what the transportation situation was in Missouri during the two-day strike, sir?

A. Just what, what is your question?

Q. Are you familiar with what the transportation situation was in Missouri, Kansas City, Missouri, and other parts of Missouri which are served by the Kansas City Transit, Inc., during the two-day strike?

A. There were no busses of Kansas City Transit, Inc., operating on those two days.

Q. Were people getting to work?

A. I assume that they were.

Q. Were school children getting to school?

Mr. Siddens: I am going to object to that, move it be stricken as being speculation, conclusion of the witness.

The Court: The answer will be stricken.

By Mr. Dunau:

Q. Do you have personal knowledge with respect to whether persons were getting to work on that day?

A. Do I have personal knowledge—my personal opinion? [fol. 43] Q. No, not opinion, sir. Do you have personal knowledge with respect to that?

A. Yes.

Q. Would you relate, based on your personal knowledge, what the situation was with respect to persons getting to work during those two days.

A. On the basis that this strike has been publicized prior to its going into effect, and that there were some rumors that there might be a seizure, I think some people could make arrangements for a short period of time that they might not be able to make if it was of longer duration.

Q. Are you saying that for the two-day period that the strike was on, from your personal knowledge people got to work as they usually did—that is they got to work?

A. They got to work, to my personal knowledge, I know that people got to work.

Q. Did school children get to school?

A. The schools were open, how many were not there, of course, I don't know.

Q. Do you have personal knowledge with respect to that situation?

A. The only personal knowledge I have are ones who go by a different method than Kansas City Transit, Inc.; they got to school those days.

Q. Do you have personal knowledge with respect to whether the employees of the electric, gas and telephone companies got to work on those two days?

[fol. 44] A. Personal knowledge I do not have.

Q. Do you have personal knowledge with respect to whether those employees got to work during those two days?

A. Personal knowledge. I do not have personal knowledge.

Mr. Dunau: I have no other questions, sir.

The Witness: I have a figure here which I believe is in error. I think I gave a figure of 248 miles exclusively in Kansas City, Missouri. I believe the correct figure is 330.

By Mr. Dunau:

Q. 330 would be the correct figure?

A. In place of the 248.

Q. Covering what routes, sir?

A. Miles in Missouri.

Q. Exclusively round trip miles within the State of Missouri would be corrected—

A. To 330 in place of 248. I made a miscalculation on that.

Mr. Dunau: Thank you.

Cross examination.

By Mr. Siddens:

Q. Now, Mr. Jenison, did you testify that the Kansas City Transit, Inc., has a franchise from the State of Missouri, that is a Certificate of Convenience and Necessity to operate a transit system?

A. Yes, the certificate that had originally belonged to Kansas City Public Service Company was transferred to Kansas City Transit.

Q. Was transferred to you and you operate under that franchise?

[fol. 45] A. Yes, sir.

Q. Approximately how many employees does the Kansas City Transit Company have?

A. You mean in the bargaining unit or total?

Q. No, altogether.

A. Altogether is just a little under 1,000; 950.

Q. 950, and in the bargaining unit I think you said there were 800—

A. 817.

Q. 817. Now, you, I think have testified regarding most of the facilities and equipment and the plant that you have. You do have an office, you have divisions and garages and motor busses?

A. Yes, sir.

Q. Now I will ask you whether or not on November 13, 1961, the State of Missouri did by proclamation and order take possession of those facilities?

A. They did at 11:59 p.m. that date.

Q. At that time were you involved in a labor dispute with the defendant Division 1287 of Amalgamated Association?

A. Yes.

Q. Has that dispute been terminated?

A. It has not.

Q. Was there an interruption of transportation service as a result of that dispute?

A. There was a strike for approximately 48 hours from midnight of the 13th to midnight of the 15th.

[fol. 46] Q. And who struck?

A. The members of Local 1287.

Q. Was picketing engaged in by the defendant Division 1287?

A. Yes.

Q. At the headquarters and garages of the company?

A. That is correct.

Q. And service was re-established on what date?

A. At midnight November 15th which would be the start of November 16th.

Q. Now would you please describe to the Court the transportation services that are normally furnished by the Kansas City Transit Company?

A. We operate 32 lines on regular schedules and over regular routes with 401 busses.

Q. Is there any other mass transportation system in Kansas City, Missouri?

A. No, sir, there is not.

Q. And what portion of the transportation services do you provide?

A. It is my opinion in excess of 90 per cent of the public mass transit service is given by the Kansas City Transit.

Q. In what manner do you design these schedules and routes for your system?

A. Our schedules and routes are designed to meet the needs and the demands of the public for transportation to and from their homes, to and from schools, churches, hospitals, places of work, recreation, and so forth. These [fol. 47] are on regular schedules and on regular routes.

Q. To what extent does the company provide mass transportation services to, within and from the central business district of Kansas City, Missouri?

A. About 75 per cent of our business is generated by activity in the central business district.

Q. When you talk about the central business district, what do you mean?

A. That's approximately the 6th Street Trafficway to Truman Road, Oak or McGee Street to Broadway, roughly that area.

Q. That is in Kansas City, Missouri?

A. That's wholly within Kansas City, Missouri. Now, we have some 25,000 persons that are brought into this district before 10:00 a.m. each normal work day and on the basis of the normal average per car, that would amount to about 17,000 additional vehicles required to bring those persons in to the central business district. I think that's—

Q. You mean it would take an additional 17,000 vehicles to bring in the 25,000 approximately persons that you bring down?

A. That we bring in.

Q. Normally?

A. Yes. And I believe—

Q. Is there that many additional parking spaces in the central business district?

A. No, I believe that 17,000 is about 50 per cent of the [fol. 48] total public spaces now available. I don't believe that many additional spaces are available.

Q. You are talking, this is on a week day, you say?

A. Normal week day.

Q. Normal week day. Now, on normal week days do you have a substantial movement of traffic within this central business district?

A. Yes. That's 75 per cent of our business generated by activities in that.

Q. And then what happens at the end of the day?

A. Well, they are transported in at the start of the day and transported out at the end of the day.

Q. Now, you mentioned about hospitals. What transportation service does your company provide with relation to hospitals?

A. Many of our lines serve hospitals direct but we have two specific instances, through the demands and requests, and insistence of the staffs and the general public we instituted a line to the Veterans Hospital which is out east, and we re-routed—

Q. That is out, you are talking about out on—

A. About 35th and Elmwood, roughly.

Q. Just off of Van Brunt?

A. Yes.

Q. That is in Kansas City, Missouri?

A. That is in Kansas City, Missouri. The other specific instance is the General Hospital which is located at about 25th Street and we re-routed out 27th Street line to go down [fol. 49] and offer direct service to the doors of General Hospital.

Q. Were these two lines operating on schedule on November 14th and 15th this year?

A. They were scheduled to operate but did not operate.

Q. Now, you mentioned about schools. What transportation service do you provide in that respect?

A. We have our regular lines which serve the schools and in addition to our regular schedules we add additional service on school days to most of the high schools in Kansas City, Missouri, Southwest, Paseo, Westport, East, Northeast, considerable extra service is operated. Now, when school is not in session that extra service is not operative.

Q. I see. Now, what about your Sunday service? What do you do about that?

A. On Sunday we operate 24 of our 32 lines and we transport approximately 25,000 persons. Our lines that are operated serve the churches; how much of it is church travel, I don't know. There are about 25,000 persons using the transit system on a Sunday.

Q. Now, during the period of the two days of this strike did the company provide any transportation service during that time?

A. No, we did not.

Mr. Siddens: I believe that's all.

Redirect examination.

By Mr. Dunau:

Q. Mr. Jenison, did I understand you correctly to say that the company had a franchise from the City of Kansas [fol. 50] City, Missouri, to operate?

A. Kansas City, Missouri, no.

Q. You were talking then when you talked about a franchise—

A. Public Service Commission of Missouri.

Q. Thank you, sir. You mentioned that it would require 17,000 additional vehicles in to Kansas City, Missouri, in order to carry transportation—in order to carry the normal population into Kansas City, Missouri, if there were no bus transportation. Did I understand that figure correctly, sir?

A. My statement was this: Prior to 10:00 a.m. there are 25,000 persons brought into the central business district of Kansas City, Missouri, and to transport them on the normal ratio of passengers per vehicle, about 17,000 additional vehicles would be required to bring those 25,000 persons into the central business district.

Q. Well, if you have vehicles which could normally seat five or six people and had car pools, why, you could immediately cut that down to about five thousand vehicles, couldn't you, sir?

A. If the average per car got up to that, yes. I am speaking of the normal ratios.

Q. Well, is it correct to speak of normal ratios during a strike situation, sir?

A. Well, I don't know how they would group ride or anything else.

[fol. 51] Q. In fact—what is your personal knowledge with respect to group riding during the two-day strike?

A. I have no personal knowledge of what it was.

Q. Do you have any personal knowledge with respect to whether there was any increase in traffic during the two-day strike?

A. My personal knowledge of it?

Q. Yes, sir.

A. It appeared that there were additional vehicles on the streets, so far as I saw, my personal opinion.

Q. Was the flow of traffic better or worse than it is when the bus transportation system is operating?

A. Traffic flow better or worse?

Q. Yes, during that two-day period, what was the traffic flow?

A. I made no personal observations of that so I couldn't answer that from personal observation.

Q. Are you an expert in mass transportation, sir?

A. In mass transportation I have had 32 years' experience.

Q. Have you had experience in cities other than Kansas City, Missouri?

A. No, sir. My career has been in Kansas City, Missouri.

Q. Now, as an expert in mass transportation, can you tell us what your judgment was of the traffic situation in Kansas City, Missouri, during the two-day strike?

A. I can give you what happened as far as mass transportation was concerned.

Q. We know that mass transportation ceased. As a consequence of the cessation of mass transportation would you give us your judgment as to what the transportation situation was in Kansas City, Missouri, during those two days?

A. As I say, the only thing I am familiar with, there was no public transportation available. Some students got to school, how many I don't know. How many people went to the hospital, I don't know. I see according to the press that there was considerable decline in the amount of business downtown; that I saw in the paper. I don't have the personal knowledge of that.

Now, the reason I didn't make any personal observations, I was not out on the streets those days. I was down at the office until about 2:00 o'clock the night the strike started, came back about 6:00 o'clock and left early so I was not out on the streets observing the traffic. I have heard some things by hearsay.

Q. Did you have any personal knowledge as to whether the people got to VA Hospital during those two days of the strike?

A. Do I have personal knowledge how they got or whether they got? I have no personal knowledge of that, no, sir.

Mr. Dunau: No further questions.

Mr. Siddens: I have no further questions.

By the Court:

Q. Do you have any figures on how many employees [fol: 53] not only reside in Kansas but work exclusively in Kansas as distinguished from the Missouri side?

A. That work exclusively in Kansas? Well, now, we have 11 runs out of our 438 that are runs exclusively in the State of Kansas.

Q. I meant individuals, sir, individual employees.

A. Now, those individuals, I am saying these individuals have two days off a week and the extra men, of course, could be required to work over in Kansas, so there are 11 daily assignments over there, and there could be a varying number of operators who would operate actually over there.

Recross examination.

By Mr. Siddens:

Q. In that connection let me ask you this. Isn't it true, though, that even those that operate exclusively in Kansas, originate in Missouri?

A. They would report for their day's work and end their day's work in Missouri, yes.

Q. At the garages in Missouri?

A. That is right.

Mr. Siddens: That's all.

(Witness excused.)

DANIEL C. ROGERS, was duly sworn:

Direct examination.

By Mr. Dunau:

Q. What is your full name, sir?

A. Daniel C. Rogers.

Q. What is your position, sir?

[fol: 54] A. I am Chairman of the State Board of Mediation of Missouri.

Q. How long have you held that office?

A. I have held that office for a little over ten years.

Q. Would it have been March 15, 1951, when you assumed office, sir?

A. It was March 12, 1951.

Q. Sir, attached to the petition for injunction in this case is a proclamation issued by the Governor of the State of Missouri, John M. Dalton, and an executive order No. 1 issued by the Governor of the State of Missouri. Are you familiar with those two documents, sir?

A. Yes, I am familiar with them. And Executive Order No. 2, did you mention it?

Q. No. I am about to get to Executive Order No. 2, sir.

A. All right.

Q. Was there an additional executive order which Governor Dalton issued pertaining to this—

A. Yes, Executive Order No. 2.

(Defendants' Exhibit 1 marked for identification.)

By Mr. Dunau:

Q. Sir, do you recognize that as a true copy of the Executive Order No. 2 which was issued by the Governor?

A. Yes, I do.

Mr. Siddens: Why don't you use these? Here are certified copies.

Mr. Dunau: All right. Fine.

May it be stipulated to receive in evidence as Defendants' [fol. 55] Exhibits 1, 2 and 3 proclamation, Executive Order No. 1 and Executive Order No. 2?

The Court: They will be received.

Mr. Dunau: We will withdraw the copy that has been marked previously as Defendants' Exhibit No. 1.

By Mr. Dunau:

Q. What action did you take on the basis of the proclamation and Executive Orders 1 and 2?

A. Well, my first observation was, of course, that immediately the proclamation and executive orders became effective, was that there was no mass transportation.

Q. No, I am sorry, sir, you must have misunderstood what I asked. What I want to ask, sir, is what acts did you perform in your capacity as the agent appointed by the Governor?

A. There being no mass transportation as of midnight October 31st I recommended that action be taken to get transportation again on the streets in Kansas City.

Q. Well, what did you do specifically?

A. I contacted the Governor's office and the Attorney General's office, as I had heretofore, and as a result of my action this step was taken to restore mass transportation to the streets of Kansas City as expeditiously as possible.

Q. What was done by you to restore mass transportation?

A. Well, this injunction proceeding that is now before the Court was instituted. It might as well have been, I [fol. 56] presume, filed in the name of the Governor's agent or in the name of the Governor as well as in the name of the State of Missouri as a plaintiff.

Q. Mr. Rogers, what did you do in order to take possession of the plant facilities and equipment of the Kansas City Transit Company?

A. I went to the company office as quickly as I could after the papers were delivered to me by a patrolman, and delivered them to the President of the company, as I have done on numerous occasions heretofore, and informed him that the property of the company was now subject to the police power and that it should from that moment of seizure on be available for operation in the public interest.

Q. Now, did your act of possession involve more than delivering the documents to the President of the company and informing him that he was now to operate the system under the police power of the State of Missouri?

A. Well, in my opinion that was sufficient when I gave him that document which amounted to the exercise of the police power in the taking of possession, it was not necessary, surely, for me to exercise any physical means of activity over the property in order to bring it under possession of the agent of the Governor. I think the papers spoke for themselves and the management understood that they were, that the property was available, and so immedi-

[fol. 57] ately informed the Governor, as you have heard in the telegram that was read a while ago.

Q. The answer, then, to my question is that all you did is what you have described?

A. Yes. I at the same time made an effort to deliver a set of the papers to the President of the union. I had some difficulty in locating him. As a matter of fact, I never did locate him. The patrolman finally gave the same papers to some of the men who were at 9th and Brighton.

Q. Were you with the patrolman when that was done?

A. Yes, I was with the patrolman when they were delivered.

Q. Is any employee of the company represented by Division 1287 Amalgamated Association an employee of the State of Missouri?

A. Well, as I understand, being an employee of the State of Missouri, the answer is no except as the State of Missouri is exercising the police power over these employees. If that constitutes them as an employee of the State of Missouri, why, then; that's in my opinion a legal question and I leave it at that.

Q. Well, after possession was taken, did the employees remain employees of the Kansas City Transit, Inc.?

A. Well, again, that's a legal question. In my opinion they remained at their posts of duty under the force of the police power of the State to continue their employment by [fol. 58] the Kansas City Transit in order that mass transportation could continue on the streets of Kansas City.

Q. Are these employees paid by you, sir?

A. They are not.

Q. Are they paid by anybody on your behalf?

A. Under the scope of the police power as applicable here, they are paid, of course, from the treasury of the Kansas City Transit Company as they have normally been paid heretofore.

Q. Has anybody but the Kansas City Transit Company paid them?

A. Well, I would say no.

Q. Do you pay social security benefits on behalf of these employees?

A. The Kansas City Transit does so.

Q. Do you?

A. The State does not.

Q. Do you pay unemployment compensation on behalf of these employees?

A. The State does not.

Q. Does the Transit Company do that?

A. The Kansas City Transit does, under the directions of the police power as laid out in these papers, the proclamation and Executive Orders 1 and 2.

Q. Well, prior to the proclamation and Executive Orders 1 and 2 did Kansas City Transit pay social security benefits?

A. Well, if they were required to under the law, I presume they did.

[fol. 59] Q. The continuation of such payments, does that have anything to do with the proclamation or Executive Orders 1 and 2?

A. The continuation of the payments is contemplated under the terms of the Executive Order No. 2.

Q. Does the State of Missouri make those payments, sir?

A. The State of Missouri does not.

Q. Does the State of Missouri contribute to the unemployment compensation benefits of these employees?

A. The State of Missouri does not.

Q. Does the State of Missouri pay the workmen's compensation claims of these employees?

A. The State of Missouri does not. In Executive Order No. 3 the

Q. Sir, would please answer my question?

A. Well, I am answering your question.

Q. Well, you answered it does not and that I think is an answer to my question.

The Court: He can explain it.

The Witness: I think Executive Order No. 2 clearly answers your question on all of these inquiries. Section 3 of the Executive Order No. 2 reads as follows: "All rules and regulations of the aforesaid utility governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of [fol. 60] Missouri."

By Mr. Dunau:

Q. Is it your opinion, sir, that under the authority of the King-Thompson Act the State of Missouri could require Kansas City Transit not to pay social security benefits?

Mr. Siddens: I object to that, calling for a legal conclusion.

The Court: Sustained.

The Witness: Well,—

The Court: Sustained.

The Witness: All right.

By Mr. Dunau:

Q. Does the State of Missouri direct these employees in the performance of their work?

A. Under the scope of the police power that is imposed upon the employees and the company, they are required to continue their employment.

Q. Does the State of Missouri direct these employees in the performance of their work?

A. The same answer would be pertinent.

Q. I suggest that the answer is not responsive to my question, sir. Do you direct these employees in the performance of their work?

A. I do not direct the employees. The management is subject to the police power of the State of Missouri and with reference to the portion of Executive Order No. 2 [fol. 61] that I have just read to you these operations of management remain normal as heretofore.

Q. Does anybody but a supervisor or an official of the Kansas City Transit, Inc., direct these employees in the performance of their work?

A. They so direct them in response to these three documents.

Q. Do you tell these employees when to report to work?

A. I do not personally. I have the management do that under the scope of the police power, that is imposes the duty on management to do that itself as heretofore.

Q. Do you tell them where to report to work?

A. The answer is no.

Q. Do you tell them what to do?

A. I think I have answered that question generally.

Q. What is the answer, sir, yes or no?

A. The answer is that they perform their services under the scope of the police power as laid down in these Executive Orders.

Q. Do you personally tell any of the people what to do?

A. I do not personally tell them, no. I don't suppose the President of the company personally tells them either.

Q. Do you direct anybody within the company to tell them what to do?

A. I do not from day to day. When I delivered the papers I let it be known that management was subject to the police powers as laid down in these three documents, [fol. 62] and management being intelligent enough to understand what the meaning of that was, it is not necessary for me in detail to direct management on how to run the company.

Q. Do you hire any employees, sir?

A. I do not.

Q. Do you discharge any employees?

A. I do not personally.

Q. You do not?

A. Personally I do not.

Q. Do you discipline any employees?

A. I do not personally. They are disciplined according to the existing rules and regulations as has been in existence for a long time and as are affirmed by the Executive Order No. 2 which I read a moment ago.

Q. Is there any aspect of the employment relationship that you control?

A. No, except to the extent that I am the Governor's agent and of the company and all of its activities are subject to the scope of the police power as laid down in these three documents.

Q. During the period of seizure have you consulted with any officer of the company with respect to the employment relationship of any employee?

A. No, I have not. I don't feel that's a part of my duty as an agent of the Governor.

Q. Do you expend any funds of the State of Missouri to [fol. 63] operate the Kansas City Transit?

A. I do not. I do not think that's within the scope of the Executive Orders issued, No. 2 of which particularly applies to me.

Q. Did you take possession of any of the company's money?

A. Within the language of the three orders, that money is subject to the disposition according to the police power as defined in these three Executive Orders.

Q. Do I understand you to say that under the—that you are authorized by virtue of the proclamation and Executive Orders Nos. 1 and 2 to spend the company's money?

A. No, you should not so understand. I did not state it that way.

Q. Then you do not have any authority to spend the company's money?

A. I do not spend the company's money personally, the company's money should be spent as it has been spent heretofore in maintaining mass transportation in the public interest under the laws of Missouri, including the Public Service Commission law since 1913.

Q. Does anybody but an officer of the Kansas City Transit Company spend any of the company's money?

A. That I don't know. I presume not. I don't believe anyone but an officer of the company would have any authority to be spending any of the company's money.

Q. Did you take possession of any of the company's bank accounts?

[fol. 64] A. Well, in the sense that you are seeking an answer, the answer is no, but the company's bank accounts and the company's property and the company's operations are all subject to the police power as spelled out in these three documents.

Q. Do you sign any of the company's checks?

A. I do not.

Q. Do you collect any of the revenue received from the operation of the company's facilities?

A. I do not. The bus operators collect the revenue and

turn it in to other personnel of the company. I don't suppose the President of the company even sees the revenue.

Q. Does anybody but an officer or an employee of the Kansas City Transit Company receive any of the funds of the company?

A. I presume not.

Q. Are any reports made to you with respect to the funds received by the company?

A. No. I do not require it. I do not feel it necessary.

Q. Have you asked for any reports?

A. I have not. The company is a responsible company and I assume that it will operate its property responsibly as it has in years heretofore and as is expected of them under the scope of these three documents.

Q. Do you make any purchases for the company?

A. I do not, personally. I don't suppose the President does.

[fol. 65] Q. Does anybody but an officer or employee of Kansas City Transit make purchases for the company?

A. I would hope not. I cannot answer personally.

Q. Does any agent of yours make purchases for the company?

A. No. I have no agent—

Q. Do you pay any of the bills—

A. —except to the extent that under the police power the officers of the company may be deemed to be my agents to whom I delegate back all of the authority of operating the company.

Q. Do you pay any of the bills of the company?

A. I do not personally. Management is supposed to take care of that under the authority of the police power, as it has normally done so for years and years.

Q. Other than delivery of the three documents, the proclamation and the Executive Orders 1 and 2, have you done anything with respect to the operation of the company?

A. No.

Q. Was any of the property of the company conveyed, transferred or otherwise turned over to you?

A. Except to the extent that it was as a matter of law by these three documents.

Q. Do you participate in the management of the company?

A. I allow that to remain as the portion of Executive Order No. 3 which I read to you, I allow that to remain as [fol. 66] a delegated authority back to the normal management.

Q. Mr. Rogers, have you until now participated in the management of the company?

A. Well, the until now is not pertinent.

Q. Until this moment, because we want to eliminate any conjecture for the future, at this moment, from the time that you delivered these three documents, to a quarter past 3:00, have you participated in the management of the company?

A. As outlined in these three documents.

Q. Are you consulted by the company's Board of Directors or officers as to the conduct of the business?

A. No, because that responsibility is theirs.

Q. Does the management of the company remain exclusively with its officers and the Board of Directors?

A. Yes, under State supervision as intended and designed in these three documents.

Q. As a result of your delivery of these three documents to the President of the company has there been any change in the conduct of the business by the company?

A. No major change, I would assume, but that I do not know.

Q. What minor changes, sir?

A. Beg your pardon?

Q. What minor changes?

A. None that I know of.

Q. Then there would be no major or minor changes that you know of?

A. Well, that would be my judgment.

[fol. 67] Q. So far as you know?

A. So far as I know the company is operating now just as it was two weeks ago before the strike.

Q. Now, during the course of the collective bargaining negotiations during the year of 1961 between the Kansas City Transit and Division 1287, did there come a time when the Missouri State Board of Mediation was informed of the existence of the dispute?

A. The Missouri State Board of Mediation takes jurisdiction under the King-Thompson Act when a labor dispute arises between the parties and the law provides that at the termination of a contract each party shall give the other notice in writing of the changes it desires to make in the contract and that copies of those changes shall be filed with the State Board of Mediation 60 days prior to the termination of this contract at midnight on October 31, 1961, which was about August 29th and the 30th, the State Board of Mediation received documents from each management and labor constituting their exchange of requests for changes in the contract, and they were filed in my office in Jefferson City as required by the King-Thompson Act, and in that manner the Act took jurisdiction of this dispute.

Q. Did there come a time during the course of the negotiations when you were informed that the parties were deadlocked?

[fol. 68] A. Well, it is not necessary that the parties inform me.

Q. Sir, the question was did there come a time in the course of negotiations when you were informed of a deadlock between the parties? The answer is either yes or no.

A. Well, yes, management notified me of a deadlock. I had a letter from Mr. Hargus, President of the union, in October addressed to Mr. Eyer, the President, in which Mr. Hargus at some length informed the President of Kansas City Transit that the parties had been in negotiations for a considerable period of time and that it was apparent that they were making no progress and that the company from the beginning had declined to make a proper offer of wages, and that he considered the situation at a deadlock, and he reminded Mr. Eyer, the President of the company, that the contract provides for arbitration, and in this letter, a copy of which he voluntarily sent to my office, he was urging Mr. Eyer, the importance of arbitrating this labor dispute and he pointed out that it appeared that we were, that the parties were approaching October 31st midnight at the termination hour of the contract without a contract and that Mr. Eyer would have to be responsible for what injury there may be to the public interest after

midnight October 31st. I have a copy of that letter here in my file before me.

The Court: May I interrupt, please? We will have a [fol. 69] recess for five or ten minutes.

(Recess)

The Witness: If the Court please, in response to the question that was asked me just before recess whether either of the parties contacted my office with reference to the necessity for mediation services, I didn't quite finish my statement. I would like to add to that.

Mr. Hargus did not write to me directly. The copy of the letter that I mentioned clearly was addressed to Mr. Eyer but Mr. Hargus did send me a copy of that for my information, as is customary.

Now, in addition, either just before or just after this same time, which was roughly around the middle of October, Mr. Hargus called me by long distance telephone and he asked me if he could meet me in my office in Jefferson City the following Friday and I told him I'd be glad to do so, or some day in the next week. I have forgotten whether it was Friday or not, I told him I would be glad to have him come. I was in my office at the designated date and time and Mr. Hargus brought Mr. John Rawlings with him. Mr. Rawlings is the President of the Missouri Federation of Labor AF of L-CIO. Mr. Hargus in that informal conference in my office outlined the facts as I have stated them in this letter that the parties were at an impasse, management was making no offer whatsoever, and that they were re-[fol. 70] fusing to arbitrate, and he was seeking my general knowledge as a lawyer and as Chairman of the Board for ten years, the meaning of that provision of the King-Thompson Act which says that all labor agreements shall be presumed to continue in full force and effect until such time as the parties give each other notice of desire to make changes in the contract, copies of which shall be filed with the State Board of Mediation. Mr. Hargus was exploring the thought that the King-Thompson Act itself required the provisions of the labor agreement between the parties could not be terminated by management as of midnight of

October 31, 1961. Management has given in a letter to the union notice of its intention to terminate the contract as of midnight October 31, 1961. Management has done that heretofore, the purpose being to avoid its provision in the contract to arbitrate even contract matters, management feeling that it is the duty of both parties to negotiate up to midnight October 31st, and if there at that moment they fail to do so, its notice of termination goes into effect and therefore the parties continue to negotiate after the termination of the contract, that management then will be rid of its contractual duty to arbitrate because the contract will not be in effect.

Mr. Hargus was seeking to explore the thought with me that management's letter seeking to terminate the contract [fol. 71] as of midnight October 31, 1961, was by force and effect of the King-Thompson law overridden and that therefore the overriding effect of the King-Thompson Act continued the contract in effect on and after midnight October 31st, 1961, and that therefore coming into November without a contract, or coming into November without the contract having been negotiated to a settlement, that management at that time then would not have succeeded in revoking its contract and thereby avoiding its contractual duties to arbitrate this contract provision. I listened to Mr. Hargus and to Mr. Rawlings with a great deal of courtesy, certainly, and even sympathy. I do not seek to interpret the King-Thompson Act in that respect because I plainly told them then and I have done so by a letter subsequently to both Mr. Hargus and to Mr. Eyer, President of the company, that the thing that Mr. Hargus advanced was really a question of law and not for me to determine but something to be left to the courts. I told Mr. Hargus that if he should press the question in conference when I would ultimately come to Kansas City to try to get the parties together in the event they failed to do so themselves that in the presence of management would take a similar sympathetic position towards the overall intention of the King-Thompson Act to maintain peace between the parties and as I have said here publicly I think arbitration even of a wage issue [fol. 72] is better than a strike. That was sort of the way I expressed my thought on it one way or the other.

Now, then, I told Mr. Hargus that if he should raise this issue when I arrived in Kansas City I would be glad at that time to discuss it with him in the presence of management similar to the manner in which I had discussed it with him and Mr. John Bawlings.

Now, I did come to Kansas City for the first time on November 30th—

Q. Sir,—

A: I beg your pardon—October 30th, and I knew at that time that the parties were at an impasse and I had so advised the Governor and I was surprised when I walked into the room over at the Federal Mediation and Conciliation Service that Mr. Hargus expressed opposition to my sitting down to be present during the negotiations. He conferred with Mr. Otto Debate First Vice-President of the International Association from Washington, they took a recess and even though Mr. O'Connell had said that it was the policy of the Federal Mediation and Conciliation Service to co-operate with State agencies that had similar mediation duties, and that I would be received accordingly under that policy, then Mr. Hargus and Mr. Debate left the room and he came back and handed me a letter addressed to whom it may concern, and I have that letter here in my file, too, substantially that letter points out that the Kansas City [fol. 73] Transit is under the jurisdiction of the Interstate Commerce Commission and the Labor Management Relations Act and that the two Federal laws exempt—preempt the field in labor relations and that there is no place for the State to make its intrusion into this labor dispute. And I sat there and read the letter and then Mr. Hargus asked me point blank, "Are you going to stay or are you going to leave?" And I said, "I'm going to stay, Mr. Hargus."

Now, I give you that as an incident to answer broadly the question as to whether or not I had been and to what extent sought with reference to the pending labor dispute and I continued to come and go at the Federal Mediation and Conciliation Service from that day on for the remainder of the meetings that were held there for five or six more, I suppose.

Q. Was it October 30th, the first meeting you attended at which the Federal Mediation and Conciliation Service was assisting?

A. Yes, they had held two or three meetings prior to that, I understood.

Q. And you attended the session at which the Federal Mediation and Conciliation Service was attempting to mediate this dispute, do I understand five or six days after October 30th, sir?

[fol. 74] A. Yes. The Federal Act so provides—

Q. Sir, just answer my question.

A. Well, I will but you ought to know that the Federal Act provides that there shall be co-operation between them and that the director may even take steps to make such formal arrangements with the State, and even remain away themselves in those situations in which interstate commerce is affected in a minor way. The Taft-Hartley Act itself so provides. And it is in that spirit in which there has been the finest of co-operation in mediation between the Federal Service and the State Board of Mediation.

Now, obviously—I want to answer that question a little further—obviously I did stay away until October the 30th and until the next day was the strike deadline and I had notice of it by Mr. Hargus's letter that I had received, as I have explained, two weeks before, and I felt that if I were going to perform any service whatsoever under the authority vested in the State Board of Mediation under the King-Thompson Act that surely come October 30th it was time for me to get to Kansas City, and I did under the circumstances as I have described.

Q. Mr. Rogers, after you sat in on the negotiations for a number of days did there come a time when you informed the parties that you were formally convening to the Missouri State Board of Mediation to conduct a hearing into [fol. 75] the dispute? Yes or no?

A. On November 10th Mr. Hargus—

Q. Sir, if you would permit me to conduct the examination we could probably get through.

The Witness: He wants me to answer as he wants. I want to answer so the Court will have an understanding.

The Court: You may answer any way you prefer just so you answer the questions.

A. On October 10th—

By Mr. Dunau:

Q. October 10th, sir?

A. November 10th.

Q. Thank you.

A. On November 10th Mr. Hargus handed the parties at the Federal Mediation and Conciliation office a so-called strike notice in which he pointed out that at midnight on November 13th all employees were instructed to cease work for the Kansas City Transit, and that meant a strike, it was clearly that, and that he was to meet them the following Monday, this was on Friday, he would meet them on the following Monday, all day in three meetings and give them strike instructions. Well, again that emphasized the fact that we were confronted with an emergency at that time and having failed to reach an agreement either in their own conferences, thirteen or fourteen of them before they even came into the Federal Mediation and Conciliation Service, and having failed before the Federal Mediation and Conciliation Service for two or three conferences, and they had admitted that on that day and prior to that day that they were at a deadlock, the union demanding 38 cents across-the-board increase, and a 48-cent fringe issue, which made a total package of 86 cents, and management calling that fantastic and admitting on its part that the offer that it did make, and made it in my presence, of a half-cent for the first year, a half-cent for the second year, a half-cent for the third year for a three-year contract, management admitted that that was a ridiculous counter-proposal, and those were the words that were used, those are not my words, fantastic and ridiculous, they are the words that management used in describing the situation that existed between the parties. Well; here came this strike notice then and I felt certainly if I were going to do anything other than just sit around and do nothing that it was time to act, and then the answer is yes, I at that time very affirmatively urged the union not to strike, of course, in

the first place, to submit the matter, if they would, to a public hearing panel; we discussed that, I didn't urge it on them; that they might, management might reconsider its refusal to arbitrate, and all of those things failing, this was practically the first time now that I had spoken in the meetings at all, I urged then that the parties surely must come [fol. 77] before the full membership of the State Board of Mediation with the purpose of giving us an opportunity to see if we could aid them in settling the dispute.

Q. When was that, sir?

A. Well, this particular time was on the 10th of November that I am speaking of—no, it was on—no, I beg your pardon—it was earlier than the 10th of November.

Q. Was it November 6th, sir?

A. Yes, let's say it was November 6th because I did assemble the Board for November the 8th and the parties came over to a neutral place that I had provided at the Hotel President as a neutral place, and Mr. Hargus in that situation came in, both sides came in, and we were not able to take up the merits of the dispute because Mr. Hargus sought to condition the proceedings of the Board by giving him a written statement that they in the first place would not be public; we discussed that, I told him it is a public Board, I couldn't agree that if someone showed up and wanted to come in that I would have to close the doors to them; I explained that to him; I told him that as a rule no one did show up, I felt that it would be a private conference but that I was not going to give him any written statement that we would not—that we would exclude any members of the press or the public.

Secondly, he insisted that I give him a written statement [fol. 78] that the Board would not make any recommendations and I told him I would not give him a written statement that the Board would not make any recommendations because I have always felt that if the Board is going to be useful at all it should sit with the parties and with the experience that the men on our Board have had in labor matters I felt that a time might come when it would be helpful to the parties if the Board did make a recommendation. Well, under those circumstances then Mr. Hargus went out and conferred with Mr. Debate some more, Mr. Debate was there.

Q. Who is Mr. Debate?

A. Mr. Debate is the First Vice-President of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America from the Washington office, as I understand it. Mr. Debate was there and they went out and conferred. When they came back Mr. Hargus handed me a letter in which he stated substantially that as a condition for the union remaining with the State Board of Mediation that the Board would have to give him a written statement disclaiming our authority to do either of these two things that I have just mentioned, either hold the meeting public or make any recommendations. I told him orally again that I would not do so. He insisted that I give him a letter to that effect. I did not have any particular objection to giving him a letter to that effect and I asked for [fol. 79] a recess on our part then in order that the Board and I might formulate such a letter and I do have that letter in my file in which, in response to his letter I replied that the Board would not give him a written guarantee that we would neither admit members of the public to the hearing or that we would refrain from making any recommendations. Mr. Hargus in his letter and his discussion, he confused between recommendations and mediation. He was taking the position that—

Q. He confused or he differentiated, sir?

A. Well, I say he was confused because in my understanding of recommendations in the spirit of the King-Thompson Act, making recommendations is only mediation, it isn't anything like arbitration. The parties well know and I always emphasize that if I make a recommendation it is only a recommendation and they can throw it in the wastebasket, it is just something to put before them to let them see whether or not it constitutes the basis of something on which they would like to make a start for responsible bargaining. And up to that time, of course, Mr. Hargus had complained, and with merit, that management had not given them a responsible offer, having informed the Governor of that, Governor Dalton himself sent a pretty strongly worded letter to management in which he urged them to disregard purely technical procedures in reference to collective bargaining and make this union a respon-

sible offer. And that's what we were trying to get done, and it never was done, and the Board was willing to make a responsible recommendation of its own.

Now, Mr. Hargus left the meeting. I don't want to say walked out but anyway he left the meeting and it was terminated that way. I talked with management awhile and let them go and then the strike situation came along on the 10th and I got in touch with the Governor again, the Governor sent strong telegrams to both parties and then I called the Board back for the next day which was Saturday and asked the parties, invited them both, I have never issued a subpoena yet in 10 years, I invited the parties both to come back and let's take another try. They came back on the morning of the 10th and Mr. Hargus, he would not come in to joint conference with management but he did come in alone with the union group, Mr. Debate along with him, and we discussed the situation, and he said it would be futile for me to expect them to come in in view of what had happened three days before where they refused to come in, except that we would give them this written statement, and I told him again I would not do that, so he said, "Well, I suppose that is the end of it then", and to which I agreed, and again he left, and the Board and I then stayed there, we dismissed the company, the Board and I stayed there, [fol. 81] and I reviewed the whole dispute with them carefully and as a result we did make a report and recommendations to the parties, a copy of which I have got the original here in my file as we wrote it out in my handwriting and substantially we pointed out that the parties had failed to reach an agreement in their own conferences or in mediation conferences and that therefore on its own the Board wished to state to the parties that its mediation services were available if they would come in before the Board and present their cases fully on both sides, that the Board would like to hear the issues and make suggestions to them as we might proceed in that manner, or if they would come before the Board and present their cases on both sides the Board would be glad then to go into an executive session and to make recommendations which were not binding on the parties but to give them some basis, the best of our judgment on what they might take as a starting point for negotiations.

I also pointed out that the Board recommended that, thirdly, that the parties should go back and reconsider their positions on arbitration. We took the position that arbitration was better than a strike.

Then I wound that up with Board approval and they were all busily engaged in helping me phrase this, and thinking it through because they were all men with lots of [fol. 82] long, long years of experience, two labor and two management, much more than I have had. Then we said, "The Board on its own responsibility recommends the following settlement of the wage dispute in a two-year contract: Four cents per hour across-the-board to all employees, increase effective November 1, 1961, six cents across-the-board increase effective January 1, 1962, and eight cents across-the-board to all employees effective November 1, 1962."

Now, the company had contended that it needed to go to the Public Service Commission to get relief and we put that four cents, which was an easy start, on November 1, 1961, and did not start the additional six cents until January 1st in order to give management time to get to the Public Service Commission before January 1st to see what relief they could get, which would make a full ten cents increase then starting January 1, 1962, then another eight cents the following November or a total package of eighteen cents over a three-year period. And then we recommended, not having opportunity to go into the numerous other issues that were so debatable between the parties and so vexing between them, we recommended that they drop all of those or that we disregard them because we felt that if we were going to make a recommendation on a package that would cost the company money we should hold it to wages only, and that's what we did. Now, we delivered copies of that to each party, we delivered copies of it to [fol. 83] the President and it was pretty fully publicized. And that was the extent up to that time of our efforts. The strike came on the 13th. We have pretty well covered the seizure. After these preliminaries—

Q. Sir, before you go on, what was the date on which you issued this report?

A. I believe it was November 11th. It was at our second Board meeting.

Q. It was November the 11th, sir?

A. Yes. It was real critical at that time because we had already received the strike notice from the union and we were doing our dead level best to try to get this thing off dead center, somebody get a responsible offer, somebody make a responsible move to get this strike settled before it took place at midnight. Well, it did take place at midnight, and then after these preliminaries were filed in this court on the 15th, I believe it was, and over in the Federal Court on the 14th, and we came and sat here in chambers with His Honor, Judge Murphy, and Judge Becker over in the other court, and after those preliminaries were out of the way, I made one more effort to try to get something done, I called the parties to come before me then at the Hotel President at 10:00 a.m. November 21st, and I talked with Mr. Hargus on the phone, I wasn't at all satisfied that he [fol. 84] was going to come, I talked with management on the phone, they said they would come. I thought I would place myself on record by sending each of them a telegram, which I did, and sent them a telegram to appear before me on the morning of November 21st at 10:00 a.m. Management showed up. The union didn't show up. And that was the last effort that I made. Then on the 22nd, which was the next day, in some manner a meeting was scheduled before the Federal Mediation and Conciliation Service. I felt that having done my best in the manner in which I have now pretty well described that I would not go over there, that if they could get together now after all of the parleying that we had done to try to get them to move and if management could go over there and make a responsible offer and they could start out on negotiations on their own with the Federal Mediation and Conciliation Service which they had failed heretofore to do, I'd be glad to see them do it. So they did meet on the 21st and management did make an offer over there, they made a 15-cent offer over a period of two years and there is where the thing stands so far as I am concerned.

And this just about reviews, Your Honor, my mediation efforts in the dispute.

Q. Sir, do you have any information in your capacity as the Government's agent who took possession of the property

[fol. 85]. as to what the transportation situation was in Kansas City, Missouri, during the two-day period of the strike?

A. Well, as to the actual condition on the streets, it would be hearsay because I was more or less tied down to my hotel room with telephone calls on innumerable questions that arise in relation to my position in a situation like this, and I was not out on the streets, so I do not have any personal knowledge of the condition of transportation out on the streets.

Q. Well, do you have any information that came to you in the course of your duties as the agent of the Governor pertaining to the transportation situation during the course of the two-day strike?

A. Well, if I follow your inquiry it is the same, I do not have any personal information.

Q. Do you have any information, sir?

Mr. Siddens: Calling for hearsay, I object to that.

The Witness: Well, I will answer him. Let me think.

The Court: What he knows of his own knowledge.

The Witness: Yes, I was going to say of my own knowledge I really don't have any.

Mr. Dunau: That's all, sir.

The Witness: Well, I was going to say in that respect, Your Honor, my own view is that where the King-[fol. 86] Thompson Act intends to implement and make secure to the people safe, adequate and continuous public utility service, but the King-Thompson Act was merely an appendage of the Public Service Commission Act 50 years later, 45 years later, or whatever it is, and that inasmuch as the legislature not only back in 1913 but again in the King-Thompson Act in 1947 declared light, heat, water, transportation, communications, sanitation, essentials of the people. Now, my view is that when one of those essentials of the people as has been legislatively found, now, the policy-making agency of this State, are totally denied a community, that that prima facie constitutes jeopardy to the public interest, health and welfare, as is later set forth in the King-Thompson Act, as the basis for taking possession by the Governor on the theory that if it is and has been found to be an essential of the people it isn't neces-

sary to sit here and prove it. The legislature made that finding, legislative finding 14 years ago and therefore, if we can look out on the streets and know that there is a total cessation or withdrawal by means of a strike of that essential of the people, then it seems to me the Governor has his reasons for invoking his authority. I don't think he has to wait until he hears an outcry from the Mayor and from the people and how they are being injured and failing to get to work and so on. I think the thing speaks for itself [fol. 87] in the law and as a matter of law it seems to me the legislature has answered the question for the purpose of this interlocutory injunction at least.

Now, if Your Honor were considering whether or not communications or transportation is constitutionally in this Act, why, then, that might be something that would come at a later time. But at this time the legislature has already found it to be an essential of the people and it doesn't seem to me that the Court would seek to set aside a 14-year-old statute of the legislature exercising the police power and having been generally at least declared constitutional by the Supreme Court of Missouri in a unanimous opinion twice. It doesn't—well, the first time in the Pigg case it didn't get into this question of seizure.

Mr. Manning: Your Honor, I hope we are not being bound by this speech.

The Witness: Well, it's—I am answering his question as to whether or not—

Mr. Manning: You are not answering any question now.

The Witness: Well, wait a minute, now. I am answering his question as to whether or not there appeared to be any reason for seizure and I think my answer is entirely pertinent to the question.

Mr. Dunau: I don't think I asked any such a question [fol. 88] but I have no objection to doing such a good job.

The Witness: Well, I am glad you have not.

Cross examination.

By Mr. Siddens:

Q. Mr. Rogers, I have a few questions I want to ask. Some mention I think was made regarding the matter of

whether or not you had taken any steps since, and what steps you had taken since you have taken possession on behalf of the Governor of the State of Missouri of the Kansas City Transit. I would like to ask you in that connection if your understanding is of your orders that if at any time you think that it is necessary for you to take steps or further action in connection of the operation or management of that company, you have the power to do so.

Mr. Dunau: Objection, Your Honor, the question calls for a legal conclusion as to what authority is conferred by the proclamation and these Executive Orders.

The Court: Overruled.

The Witness: We have gone into that, of course, I have pointed out the three sections of Executive Order No. 2 and I will re-state it. Of course, Executive Order No. 2—

By Mr. Siddens:

Q. Now, the question I asked you is as to the future.

A. Yes, I am going to answer, yes, sir.

Q. You have heretofore answered what you have done?

[fol. 89] A. Yes, that's right.

Q. Now, I asked you only as to the future.

A. All right.

Q. What you think you can do.

A. All right. Well, first, I ought to say this, that certainly if management should provoke a lock-out tomorrow, we would probably be up here with a proper request for restraining management or if tomorrow morning I would find that the office down there has closed and the management had all gone and the employees were gone and therefore there was no management to fulfill the provisions of Executive Order No. 2, Section 3, why, then I feel confident that I or someone would have the authority under these documents to take proper steps against management and see to it that management got back on the job and stayed on the job and performed their duty in the public interest as they are required to under the Public Service Commission Act. Of course, I feel that both management

and employees are impressed with that responsibility in the Public Service Commission Act and management cannot abandon its duties and certainly, that under the Public Service Commission Act, and certainly it cannot perform them without its employees and so the Public Service Commission Act as in the public interest is impressed upon the employees as well as upon management to furnish safe, continuous and adequate service. And, therefore, under the spirit of the Public Service Commission Act employees may not strike to close down a public utility. And this is only an implementation, as it had a while ago, for the situation that the legislature had seen in 1913 when there were no unions that could strike and lay a whole community in a state of paralysis. So they came along in 1947 and supplemented the King-Thompson Act—supplemented the Public Service Commission Act with the King-Thompson Act—

Q. Mr. Rogers, I want to direct your attention to the question I asked you.

A. Yes, all right.

Q. The question is if circumstances should arise that you think that you have to interfere, there is some reason why you need to interfere in the management, control or operation of this company, do you think under the power that you have conferred on you by the Governor that you can do that?

A. Absolutely.

Q. All right. Now, then, I want to ask you this. As I understood you to make the statement prior to the strike and prior to the Governor's seizure, the union had made demand totalling 86 cents; is that correct?

A. That's correct.

Q. And at that time or prior to the strike and before the Governor's seizure, the management had made an offer of a half cent for each year for three years. Is that true?

A. 91] A. That is correct.

Q. And that is where the negotiations stood at the time that the Governor took possession?

A. That's right, and had stood that way for ten days.

Q. Now, I would like to ask you, Mr. Rogers, if you are a defendant in a suit filed by Division No. 1287 Amal-

gamated Association in the United States District Court for the Western District of Missouri?

A. I am and each member of my Board is also a defendant, along with the Governor.

Q. And that suit was filed on November the 14th?

A. That's correct.

Q. And you were served in that action?

A. That's right.

Q. In which the same issues, or at least some of the same issues, are involved in it that are involved in this lawsuit?

A. I would say the identical issues.

Q. Now, I would like to ask you, Mr. Rogers, who are the members, you mentioned, you referred to the members of the State Board of Mediation, just name them, who they are.

A. Well, the two labor members are Mr. Al Fults of St. Louis. He has been with the Brotherhood of Locomotive Engineers probably 40 to 50 years, had long years of experience in grievance and mediation work in railroads. Mr. [fol. 92] Charles Bibbs of St. Joseph who was business manager of the International Brotherhood of Electrical Workers of the St. Joe Light and Power Company for a long number of years and worked as a union member there for most of his life. A management member is Mr. Truman Henry out here at Lee's Summit. He is in charge of personnel and the Vice-President of the Missouri Public Service Company here that has the big office out on 50 Highway. Mr. Henry came up from the ranks as a union man for many years and attained his present position. He does all the negotiating for the company. And the other management member is Mr. J. Ray Lambright. Mr. Lambright is the manager of the Northwest Missouri Co-Operative Association at Savannah, Missouri. We have disputes in REA's and until his appointment we had never had a man from the REA on the Board so Governor Dalton and I talked it over and thought it would be well by this time to have an REA representative on the Board, and Mr. Lambright is on the Board. And I am the public member of the Board and was appointed March 12, 1951.

Mr. Siddens: I believe that's all.

Redirect examination.

By Mr. Dunau:

Q. Mr. Rogers, do you recall your testimony in a proceeding known as the State of Missouri against Local Union No. 8-6 Oil, Chemical and Atomic Workers?

A. That's the Laclede Gas Company seizure case. Yes, I [fol. 93] believe I am generally acquainted with my testimony at that time.

Q. I am reading from page 265 of the transcript of record before the Supreme Court of the United States in that case and I ask you whether these are the questions that were asked of you and the answers you gave.

Mr. Siddens: If Your Honor please, this is objected to. This seems to be cross-examination and an attempt to impeach the witness here. This is his own witness.

Mr. Dunau: I think that is quite a formalism to say that Mr. Rogers is my witness. It is rather obvious that Mr. Rogers is not called by me as a person who I can expect to testify—

The Court: Objection overruled.

Mr. Dunau: Thank you, sir.

By Mr. Dunau:

Q. The question is, "Mr. Rogers, therefore no employee of LaClede Gas Company on strike is your employee, is that correct? Answer: That might be a question of law, but that is my opinion. I haven't been instructed to the contrary. Question: But as agent for the Governor that is your opinion? Answer: I certainly am not exercising any master and servant relation to him. Question: By the master and servant relation, you mean to say they are not and will not be your employees, isn't that right? Answer: [fol. 94] Yes. Question: That they will or they will not? Answer: They will not."

Do you recall those questions and answers?

A. And I repeat it today, they are not and will not be. They are employees subject to the documents that I have read here, and I was answering—well, I don't know whether

that was my television interview or whether it was in the court but—

Q. This was in the courts.

A. Well, they put the television interview in the court record. But anyway whichever it was, the answer is the same.

Q. And the employees of the Kansas City Transit Company are not and will not be employees of the State of Missouri, is that right?

A. Now, I didn't say that. Not employees of mine. They are employees within the scope of these three documents that we have mentioned here. And I said a while ago if that makes them employees in some limited or definitive sense of the State of Missouri, that's a question of law.

Q. I see, sir.

A. That they are not employees of mine in the master and servant relationship.

Q. You were then answering those questions as a personal individual unrelated to your function as an agent of the Governor when you said "they are not my employees"?

A. Oh, I wouldn't hedge like that on my part, I am not [fol. 95] too concerned about what interpretation you might wish to make of it. I am not going to be too positive. If it is a flexible situation in which you think you may interpret it to your advantage, I have no objection.

Q. No, I am not asking you to take objection or not to take objection as to how I have interpreted testimony. I am asking you what is your testimony. Did you intend those answers to reflect answers of yours as an individual?

A. I told you that I answered those questions just as you have read them there and you may make the most of them.

Q. Did you answer those questions as an agent of the Governor when you said "they are not my employees and they will not be my employees"?

A. Well, what does the record say? Was I asked that particular question?

Q. The record is on Page 265, sir.

A. Well, I know, but was I interrogated with reference to whether I was answering them personally or as an agent of the Governor?

Q. My understanding is that you were answering them entirely as an agent of the Governor of Missouri.

Mr. Siddens: I think we better not talk about what the understanding is.

The Court: Sustained.

The Witness: Yes.

[fol. 96] By Mr. Dunau:

Q. May I read them to you to clarify what your testimony was from page 179 of the record in the Supreme Court of the United States, these are the questions and answers as they were transcribed from your radio broadcast. The question—

A. Well, now, then that pinpoints it. They were from the radio broadcast and I was sitting there with an announcer interrogating me and while I have no objection, they were without opportunity to study the situation or to be as analytical as I may be able to do in a situation like this, and I have no objection and I said at that time those are my questions and answers, and I have listened to them on this re-playing in the courtroom, and there isn't a one that I would change today, and I will say that when you get through reading all of them.

Q. I don't intend to read all of them. I intend to read only one question asked you and the answer, and ask you if this is the—

A. That is the answer, I will tell you that before you ask it.

Q. I would rather—the question is: "During the seizure of the Laclede Gas properties are you my employer and am I working as an employee of and for the State of Missouri? Answer: The 2,200 striking employees of the Laclede Gas Company are working for the Laclede Gas Company. They are not employees of the State of Missouri."

[fol. 97] Was that your question?

A. That was my question and I explained that a while ago in my view as I understand the relation of employer and employee, they are not employees as such of the State of Missouri, but that they are employees working under

the authority of the police power of the State of Missouri to remain in their positions to render this utility service to the public as required by law.

Mr. Dunau: Thank you, sir.

(Witness excused.)

Mr. Browne: If the Court please, my name is Harry Browne—may we have this on the record—Harry L. Browne and this is my partner Arthur J. Doyle. We would like permission at the conclusion of this case to file a brief. Neither of us are going to be present tomorrow; otherwise we would have waited until tomorrow, but since neither of us are going to be here, we would like permission to file a brief.

The Court: The Court welcomes any help you can give. I will be happy to have your suggestions and briefs. I hear no objections.

Mr. Dunau: Well, how long would it take you to get a brief in?

Mr. Browne: We will get our brief in within the time prescribed by the Court.

[fol. 98] Mr. Dunau: We do not personally plan to file any briefs. We have a short memorandum we are going to file with the Court tomorrow.

The Court: I assume it will be done promptly, Mr. Browne. I intend to rule on this quite expeditiously.

We will recess until 10:00 a.m. tomorrow morning.

(Adjournment)

MORNING SESSION, TUESDAY, NOVEMBER 28, 1961

LOREN HARGUS, was duly sworn:

Direct examination.

By Mr. Dunau:

Q. What is your full name, sir?

A. Loren Hargus.

Q. Where do you live, sir?

A. 5701 Tracy.

Q. Do you hold a position with Division 1287 of the Amalgamated Association, sir?

A. Yes, sir.

Q. What is that position?

A. President.

Q. How long have you held that position?

A. Since July 1, 1944.

Q. Now, would you describe in general what are the classifications of the employees of Kansas City Transit which are represented in collective bargaining by Division 1287.

A. Basically they consist of operators, mechanics, service men, cleaners and janitors, and then other miscellaneous classifications.

Q. From what time has Division 1287 represented these employees?

[fol. 99] A. Since the certification handed down by the National Labor Relations Board.

Q. Was that February 19, 1943, sir?

A. February 19, 1943.

(Defendants' Exhibits 1, 2, 3 and 4 marked for identification.)

By Mr. Dunau:

Q. Mr. Hargus, I will show you a three-page document, the first page entitled "Supplemental Decision and Certification of Representatives," issued by the National Labor Relations Board in Case No. R-4705, and the last page a stipulation in the same case entered into between Kansas City Public Service Company, Amalgamated Association and the Regional Director of the 17th Region of the National Labor Relations Board. I will ask you whether these are accurate copies of the documents I have identified.

A. That is correct.

Mr. Dunau: I offer this in evidence as Defendants' Exhibit 4.

The Court: Defendants' Exhibit 4 will be received.

By Mr. Dunau:

Q. What was the date of the first collective bargaining agreement which was entered into between Division 1287 and the company, sir?

A. 1943.

Q. Has the Division had collective bargaining agreements with the company since that time?

A. That's correct.

[fol. 100] Q. What is the term of the most recent collective bargaining agreement?

A. November 1, 1959 through October 31, 1960.

(Defendants' Exhibit No. 5 marked for identification.)

By Mr. Dunau:

Q. Mr. Hargus, I show you what is entitled an agreement between Division 1287 and the Kansas City Public Service Company dated as of November 1, 1959, and ask you whether that is the agreement which expired and which you have just identified in your testimony?

A. That is correct.

Mr. Dunau: I offer that in evidence.

The Court: Defendants' Exhibit 5 will be received.

By Mr. Dunau:

Q. Now, prior to the expiration of the most recent agreement did the Division give notice to the company of a desire to negotiate proposed changes in the agreement?

A. It did.

Q. When did it do that?

A. Under date of August 29, 1961.

Q. And did it send a letter to the company identifying the proposed changes it wished in the agreement?

A. It sent a transmittal letter together with specific contract changes proposed by the union.

Q. Were copies of that letter sent to others?

A. Yes, sir.

[fol. 101] Q. To which others were copies of that letter sent?

A. They were sent to the Federal Mediation and Con-

ciliation Service and also to Missouri State Board of Mediation.

Q. Did the company notify the Division 1287 of its desire to terminate the agreement?

A. It did.

Q. When did it so notify the Division?

A. Under date of August 15, 1961.

Q. Now, was there a further notice given by the Division to the Federal Mediation and Conciliation Service concerning the negotiations between the Division and the company?

A. Yes, sir.

Q. When was that given?

A. Under date of September 29, 1961, at which time the Division filed Form F-7, Notice of Dispute, copies of which went to the Federal Mediation and Conciliation Service, to the Missouri State Board of Mediation, to the Kansas Department of Labor and to the Kansas City Transit, Inc.

Q. Now, during what period of time in 1961 did negotiations take place between the company and the—

A. The negotiations began on September 19, 1961.

Q. What is the last meeting that the Division has held with the company?

A. November 22, 1961.

Q. Now, was an impasse reached in bargaining?

A. Yes, sir.

Q. When was that impasse reached?

[fol. 102] A. In our opinion the impasse was reached on or about October 13, 1961.

Q. Would you identify for us the subjects which were in dispute between the company and the union?

A. Well, at that time all of the subjects were in dispute. Do you wish that I should name them?

Q. Name those which were in dispute.

A. Basically the issues?

Q. Yes.

A. Wages, of course, were in dispute; vacations with pay; group insurance; pensions; disability allowances; sick leave; a different system of work day for all maintenance employees; a profit sharing plan; a cost of living plan; and others. That's some of the basic issues that were involved. Runs, for example, in transportation; minimum guarantees;

extra man's guarantee; bonus for drivers who would go a full year without an avoidable accident.

Q. Did there come a time, Mr. Hargus, when the Federal Mediation and Conciliation Service began to attempt to mediate the dispute between the company and the union?

A. Yes, sir.

Q. When was that?

A. On October 19, 1961.

Q. Have negotiations since then been with the assistance of the Federal Mediation and Conciliation Service?

A. Yes, sir.

[fol. 103] Q. Did there come a time when Mr. Rogers, Chairman of the State Board of Mediation, participated in these negotiations?

A. Yes, sir.

Q. When was that, sir?

A. On October 30, 1961.

Q. Did he continue to sit in on those negotiations?

A. He sat in with the mediation—Federal Mediation Service since that time, yes.

Q. When you say since that time, is that—

A. Since October 30th.

Q. Through November 22nd?

A. I believe he was not at the meeting on November the 22nd.

Q. Did there come a time when Mr. Rogers notified the company and the union of his intention to assemble the full State Board of Mediation for the purpose of holding hearings on the dispute?

A. Yes, sir.

Q. When was that, sir?

A. On November 6, 1961.

Q. Was such a Board convened?

A. It was.

Q. When?

A. On November 8, 1961.

Q. Would you describe for us what happened on November 8, 1961, when the Board was convened?

A. Mr. Rogers convened the entire State Board of Mediation and asked both parties to appear. Both parties did appear. The union requested some ground rules under

which we might successfully meet in the matter of mediation, and in that effort they offered to meet with the State Board of Mediation.

[fol. 104] We offered to meet with the State Board of Mediation and lend our assistance to this dispute so long as the State Board of Mediation would confine its efforts strictly to mediatory efforts and not engage in making recommendations or publicizing the meeting.

Q. What was the response from Mr. Rogers with respect to that suggestion from you?

A. Mr. Rogers' position was that he felt that the State Board of Mediation as such had the same powers and jurisdiction as that of a panel which is provided for in the law, and that this—

Q. Which law, sir?

A. The King-Thompson Law, so-called King-Thompson Law. He contended that the Board had the right and might well exercise its alleged right to make recommendations and even make the meetings public.

Q. What did the union do when Mr. Rogers for the State Board of Mediation expressed his view that the meetings would be public and that recommendations would be made?

A. Well, the union, of course, has always felt that negotiations cannot be properly conducted in the newspapers or in the public—the union under those circumstances handed down by Mr. Rogers, felt that we could not participate in the meetings before the State Board of Mediation.

Q. Did the union then withdraw from that meeting on November 8th, sir?

A. We did.

[fol. 105] (Defendants' Exhibits 6 Through 10 Marked for Identification.)

(Colloquy outside the record)

Mr. Dunau: We have agreed to introduce into evidence the documents that I will identify for the record.

Mr. Siddens: Yes.

Mr. Dunau: As Defendants' Exhibit 6, a telegram dated October 31st to Mr. Hargus from the Governor.

As Defendants' Exhibit 7, a reply, a telegram replying to the Governor from Mr. Hargus dated November 1, 1961.

As Defendants' Exhibit 8, a letter dated November 8, 1961, to the members of the Missouri State Board of Mediation from Mr. Hargus.

By Mr. Dunau:

Q. Mr. Hargus, was this letter delivered to Mr. Rogers at the meeting of November 8th?

A. Yes, sir.

Mr. Dunau: As Defendants' Exhibit 9, a letter from Mr. Rogers to Mr. Hargus dated November 8, 1961.

By Mr. Dunau:

Q. Mr. Hargus, was this letter handed to you at the meeting of November 8th by Mr. Rogers?

A. Yes, sir.

Mr. Dunau: As Defendants' Exhibit No. 10 a telegram dated November 14, 1961, from the Governor to Mr. Hargus notifying him of the possession taken of the property of the Kansas City Transit Company.

[fol. 106] By Mr. Dunau:

Q. Mr. Hargus, did there come a time when the members of Division 1287 voted to strike in 1961?

A. Yes, sir.

Q. When was that, sir?

A. Well, after the company, of course, had unilaterally terminated our agreement and had upon reaching an impasse refused to arbitrate the unsettled issues, then we felt we had nothing left for us to do except to take a strike vote among our members and that was done on October 31st, November 1st and November 2nd, over a period of three days.

Q. Was that strike vote by secret ballot?

A. It was.

Q. What was the result of that strike vote, sir?

A. The result of the strike vote was as follows: There were 775 members voted, 681 voted for the strike, 74 voted against the strike and there were two blank ballots.

Q. Now, there were 817 employees according to the testimony yesterday who are active on the payroll of the company. Did the Division account for the number less than 817 who did not vote?

A. Yes. We had the lists checked designating those who voted and who did not vote and we found that the only ones that did not vote in the election were those who were home sick in bed or in the hospital or out of town on vacations.

Q. Now, did a strike take place, sir?

[fol. 107] A. Yes, sir.

Q. When?

A. At midnight November 13, 1961.

Q. Did picketing take place?

A. Yes, sir.

Q. Where?

A. Picket lines were established at the 26th and Harrison location, at the 9th and Brighton location and at the 10th and Lister location.

Q. Are these locations in Kansas City, Missouri, sir?

A. Yes, sir.

Q. Was the strike and picketing discontinued?

A. It was.

Q. When?

A. In the evening of November the 15th.

Q. Why?

A. Because I had served upon me a temporary restraining order issued by the Circuit Court of Jackson County.

Q. During the period that the strike and picketing took place was the strike and picketing peaceful?

A. Yes, sir.

Q. Now, after possession of the property was taken did you make inquiry of Mr. Rogers, Chairman of the State Board of Mediation, as to how to process grievances which might arise?

A. I did.

Q. When was that, sir?

A. I don't recall the date offhand.

[fol. 108] Q. Did you send a wire to Mr. Rogers?

A. I first talked to him on the telephone about it and he seemed to evade the question somewhat in my opinion, in other words, I wanted to know what individuals who

were acting as company representatives in the handling of these grievances and disputed issues which I had some piled up that had to be processed, he only referred me back to the order of the Governor. And then later I sent him a telegram setting forth my views.

Q. Did he respond by telegram, sir?

A. Yes, sir.

(Defendants' Exhibits 11 and 12 Marked for Identification.)

Mr. Dunau: We have agreed to have received in evidence as Defendants' Exhibit No. 11 a telegram from Mr. Hargus to Mr. Rogers dated November 17, 1961 and as Defendants' Exhibit No. 12 a telegram from Mr. Rogers to Mr. Hargus. These are the telegrams referred to in the testimony of Mr. Rogers.

As I understand, these have been received in evidence. The Court: They have been received.

By Mr. Dunau:

Q. Mr. Hargus, were there occasions previous to 1961 when the Governor of Missouri, pursuant to the King-Thompson Act, took possession of the property of the Kansas City Transit Company as a result of a threatened [fol. 109] strike by Division 1287?

A. Yes, sir.

Q. When were those previous occasions?

A. In 1950 and in 1957.

Q. Was the precise date in 1950 April 29, 1950, sir?

A. As I recall, April of 1950 to December the 11th, 1950.

Q. Those were the dates of the seizure?

A. Yes, sir.

Q. In 1957 was the precise date of the seizure November 6, 1957?

A. November 6, 1957 through, I believe it was, March 6, 1957.

Q. 1958?

A. '58, yes.

Q. Now, in 1950 did seizure take place before a strike began?

A. Yes, sir.

Q. Did an actual strike take place?

A. No, sir.

Q. Why did it not?

Mr. Siddens: I am going to object to that as wholly immaterial to any issue in this case.

The Court: I do not know but I will permit it. Overruled.

By Mr. Dunau:

Q. In 1957 did seizure take place before a strike occurred?

Mr. Siddens: Objected to as immaterial to any issue in this case.

The Court: Overruled.

[fol. 110] A. Yes, sir.

By Mr. Dunau:

Q. The answer is yes, sir?

A. Yes, sir.

Q. Did an actual strike take place?

A. No, sir.

Q. Why not, sir?

Mr. Siddens: Same objection.

The Court: Overruled.

The Witness: We didn't feel that we had a right to strike.

By Mr. Dunau:

Q. By virtue of the King-Thompson Act?

A. Yes, sir.

Q. It was testified yesterday, sir, that there are 817 active employees of the company represented by the Division. Is that correct, sir?

A. Approximately.

Q. How many of these employees live in Missouri?

A. About 665.

Q. How many live in Kansas, sir?

A. About 150.

Q. 115 or 50?

A. 150.

Q. Do you know, sir, how many men live in Kansas who operate busses on routes exclusively within Kansas?

A. Well, they have the one line that operates exclusively in Kansas. In addition to that they have three other lines that operate exclusively in Kansas during certain periods of the day or the week, but I do know offhand some of the [fol. 111] men who operate on the 7th Street-Parallel which operates exclusively in Kansas who live in Kansas.

Q. About how many are those, sir?

A. About nine.

Q. Now, sir, is it physically possible to conduct a strike directed to the Kansas operations of the company without interrupting service of the company in Missouri?

Mr. Siddens: Objected to as invading the province of the Court and calling for a legal conclusion.

Mr. Dunau: I said it is physically possible.

Mr. Siddens: Also asking for speculation.

The Court: Overruled.

The Witness: I would say it would be a physical impossibility because of the geographical layout of the State of Missouri with Kansas, and also as to our routes. To give you two specific examples, we have the Quindaro, Minnesota, Argentine lines that operate across the Intercity Viaduct, and, of course, the service to the Fairfax Industrial District in Kansas, people are carried across the Intercity Viaduct. That is quite a lengthy viaduct and the state line you will find is somewhere about the middle of that viaduct, so it would be in my opinion, and I have been with the operations of this company for over 35 years, a physical impossibility to operate only in Missouri and fulfill our [fol. 112] responsibility through operating on our lines in Missouri and strike the Kansas operation without affecting the riding public of Missouri.

Another example would be on the 23rd Street Viaduct where we have the 18th Street line and also the Argentine line crossing that viaduct, and you will find the state line in the middle of the viaduct, and you just can't pull a bus up to the state line and stop it or turn it around or anything of that kind. There is just no place to do that.

Moreover, if the Missouri patrons were going to have announced to them that the bus was only going to the state line and deliver them at the middle of these viaducts I am confident they wouldn't get on in the first place, so that would affect the riding habits of the Missouri patrons.

Moreover, this system operated by Kansas City Transit is a network of integrated operations serving the metropolitan area covering Kansas City, Missouri, Kansas City, Kansas, North Kansas City, Independence, Missouri, and points south here. They have their transfer regulations, Missouri patrons getting on the bus in Missouri going across into Kansas and using a transfer to catch a Kansas line to reach their destination, and vice versa, so the network of the system and the integration of the operation is such that it would be a physical impossibility to divide the two.

Mr. Dunau: I have no further questions.

[fol. 113] Cross examination.

By Mr. Siddens:

Q. Mr. Hargus, you say it is a physical impossibility to turn a bus around. Is it a physical impossibility to turn a bus around on the Missouri side before you enter the viaduct on either of these viaducts, the 23rd Street or the Intereity Viaduct?

A. Well, there might be some place prior to reaching the viaduct in which a bus could be turned around but we would not be, of course, fulfilling our responsibility to cover the lines in Missouri.

Q. But you could physically turn the bus around in the State of Missouri, could you not?

A. Yes, but we could not if we went to the state line.

Q. You couldn't go right up, butt up against the state line?

A. No, sir.

Q. But you could turn back short of the state line a quarter of a mile or so without difficulty?

A. There might be a place, yes, to do that.

Q. So that it would be physically possible, then, to operate wholly in Missouri, I mean physically possible?

A. No, I don't think so.

Q. You just said you could turn around before you reached the state line. You couldn't turn around wholly in Missouri, then, couldn't you?

A. We have an obligation, of course, to serve the routes [fol. 114] in Missouri and the routes in Missouri run to the state line. And if you cut short of the state line, then, of course, you are not serving the—

Q. Mr. Hargus, you are confusing legal obligation and the physical possibility. The physical—I understood you to talk about the physical possibility of turning around within and operating within the State of Missouri. Now, that's not the same, is it, as the legal question of whether you can go to the state line or not?

A. Well, all I am saying is this, that it is a physical impossibility to serve the lines in Missouri to the full extent because you cannot, of course, turn busses around in the middle of the Intercity Viaduct or the 23rd Street Viaduct.

Q. But you just answered the question that you could turn them around just short of the viaduct, didn't you?

A. But we would not be fulfilling our responsibility.

Q. That's a legal question then instead of a physical question, isn't that true?

A. I can't answer the legal question.

Q. Mr. Hargus, I would like to ask you with reference to this Defendants' Exhibit No. 10, the telegram from Governor Dalton to you dated November 14th. Did you receive that before or after you filed your suit in the Federal Court?

A. I couldn't answer that. I don't know.

[fol. 115] Q. Well, it was the same day?

A. I don't know.

Q. Well, it was the same day, wasn't it? Don't you know that?

A. I don't—I don't know whether I received the telegram before the case was filed or after.

Q. Well, I say, though, it was on the same day?

A. If you say it was on the same day, I accept your word for that.

Q. Yes. And you knew that the suit was to be filed in the Federal Court, did you not?

A. Well, of course, our attorneys, we have attorneys that handle our business on that and I think they could probably answer that better than I could.

Q. I see. Well, you authorized the filing of the suit in the Federal Court, it was filed in the name of the union, was it not?

A. Yes.

Q. And you knew that the suit was to be filed in the Federal Court?

A. There again—

Q. You had authorized your attorneys to file such a suit in the Federal Court, had you not?

A. I think you would have to—yes, we authorized suit be filed, yes.

Q. All right.

A. Yes.

Q. Now, Mr. Hargus, have you ever looked at the petition that is filed in Federal Court? Have you ever seen that? [fol. 116] A. I have seen it. I haven't studied it thoroughly, but I have seen it, yes.

Q. Well, do you or do you not know whether or not the constitutional questions, the issues that are presented in the Federal Court are the same as the issues presented in this case?

Mr. Dunau: May I suggest, sir, the Governor has the petitions in both cases, you can compare them and see whether they are the same or not. I fail to see how this kind of a question is properly directed to a lay witness.

The Court: Well, I am not so sure he knows the answer, but he may answer if he does.

Mr. Siddens: Yes. I don't know for sure, I am just trying to find out.

By Mr. Siddens:

Q. If you do not know that to be a fact,

A. I don't know whether they are the same wording.

Q. But the issues are the same, that's all I am asking, whether the wording is the same, the issues are the same?

A. Let them speak for themselves.

Q. You are attempting to raise, are you not, on behalf

of the union the same issues in the Federal Court that are involved in the proceedings here? Is that not true?

A. Well, again I say I think the petitions would speak for themselves.

Mr. Siddens: I believe that's all.

(Witness excused.)

[fol. 117] Mr. Dunau: Your Honor, that concludes the testimony on behalf of the defendants.

Defendants Rest

PLAINTIFF'S EVIDENCE

WILLIAM G. AUSTIN, was duly sworn:

Direct examination.

By Mr. O'Malley:

Q. Will you state your full name to the reporter?

A. William G. Austin,

Q. Where do you live, Mr. Austin?

A. 8001 Rosewood Drive, Shawnee-Mission, Kansas.

Q. What is your business?

A. I am Manager of the Merchants Association.

Q. Describe to us what that association is, how its members are constituted.

A. It is a group of retailers, you might term it to be a Chamber of Commerce for retailers only. Its functions are to act on anything that affects the merchants as a group or a whole.

Q. In what area does that Merchants Association operate?

A. In the area of Kansas City, Missouri.

Q. How long have you been with the association?

A. Thirty-five years.

Q. Can you briefly tell the Court what services your association renders to its members?

A. We discuss store hours, legislation, parking, movement [fol. 118] of traffic, promotion of various types.

Q. How long have you lived in the immediate vicinity of Kansas City, Missouri?

A. Sixty years.

Q. Sixty?

A. Sixty.

Q. How long have you been with the association?

A. Thirty-five.

Q. What businesses were you in prior to that time, sir?

A. Lumber business, stockyards and oil business.

Q. Did the fact of an impending strike by the Kansas City Transit, Inc., come to the attention of your association some time in the early part of November this year?

A. It did.

Q. State to the Court how that information came to your association and what action, if any, you took in relation thereto for the members of your association.

A. We heard that the strike was impending and we called an emergency meeting on Monday afternoon and informed our members that they should prepare themselves for an eventuality if the strike did occur, that eventuality being that they should properly arrange for their employees to get to work without the services of the Transit Company.

Q. Was your association in a position to do so and did it offer any particular plan to your members for meeting this emergency that you thought would attend?

A. The only plan we offered to them was the eventuality [fol. 119] and to suggest to them that they should prepare maps showing the location of their employees so they could get in touch with each other and possibly arrange group rides. The conditions in each store being different, we could not prepare a plan that would affect all stores.

Q. About how many members do you have in your association?

A. Fifty-eight.

Q. Can you tell the Court in about what area of Kansas City these members' businesses are located?

A. Well, they are located all over Kansas City, the predominant number of them are downtown but we have Sears

and Wards and seven stores on the Plaza, the balance are downtown.

Q. Were the plans that you gave to your members plans of long standing or were they hurriedly drawn up? Had you previously had any plan for this emergency?

A. No, sir. They were rather hastily drawn.

Q. At what hour of the day was your meeting called and the exact date of it?

A. 2:30 in the afternoon. I would have to see a calendar for the exact date; I believe the 13th is correct. Is November 13th on Monday?

The Court: Yes.

The Witness: Well, then, that would be the date.

By Mr. O'Malley:

Q. Where was this meeting held, Mr. Austin?

A. At our offices at 1110 Grand Avenue.

Q. How many people attended that meeting?

[fol. 120] A. Twenty-eight.

Q. Do your members have any type of executive committee that can act for the whole membership?

A. They have a Board of Directors.

Q. What representation was there on that date from the Board of Directors?

A. The President and I can't answer that exactly, but I believe eight or nine members of the Board.

Q. What is the total membership of the Board?

A. Seventeen.

Q. How long did that emergency meeting last on Monday?

A. Approximately an hour and a half.

Q. That would be from 2:30 until—

A. Until nearly 4:00, about a quarter of 4:00, I believe.

Q. You were in on the meeting yourself?

A. Yes, sir.

Q. What were the final directives received by the members in attendance?

A. As I have stated, that they should go back and prepare their employees, inform them that a strike was imminent and prepare their maps so they could get locations

of living places, and get in touch with groups that might live in their area to arrange for group riding.

Q. Now, if that meeting adjourned at 3:30 how much time did that leave the members to acquaint their personnel with [fol 121] the emergency?

A. Some stores it allowed them approximately an hour, other stores that were open on Monday nights until 9:00 o'clock it allowed them that interim.

Q. Do you have any knowledge as to the number of employees that might have been affected by the membership of your organization at that time?

A. Citywide?

Q. Yes, sir.

A. Approximately 20,000 people.

Q. Mr. Austin, can you tell the Court just why these plans have to be made, whether there is a benefit to the employees or whether there is a benefit to the store owners, your members, or just what is accomplished, whose benefit is served by making these hurried plans?

A. Well, primarily, of course, the stores benefit to help their employees but eventually that becomes service to the public because the retailers are the final link in the chain of distribution to the public.

Q. Do mercantile establishments, members of your association, in an emergency of this type ever find it necessary to furlough or lay off people?

Mr. Dunau: I object to the words "emergency of this type" as being—

The Court: You might rephrase it.

[fol. 122]

By Mr. O'Malley:

Q. In the situation confronting the members of your association on Monday, November 13th, do you know of your own knowledge whether or not it was within the plan of your members to furlough or lay off any employee?

A. Well, the retail stores today operate with what they call part time employees, regular part time employees to distinguish, sir. Naturally, if you did not expect business to be good on Tuesday you would not call in the regular part time employees, thus you would have a reduction of

force. You would also, if you were on the ball so to speak, change your advertising and any other things that you could cut your expenses on.

Q. In laying off employees or cutting back, do the employees have any voice in that act of management?

A. No, sir, they would not have.

Q. Does your membership in a situation such as we have disclosed have any plan for affording their employees transportation at the cost of the mercantile establishments?

A. No, sir, they do not.

Q. In the event of a mass transit stoppage in Kansas City on November 14th, if you know, tell the Court what transportation other than Kansas City Transit, Inc., is available to people coming to the downtown area in Kansas City.

A. The only transportation that I would know of would be the bus lines that run into Kansas which we call [fol. 123] interurban lines.

Q. Mr. Austin, over a period of 30 years since you have been with the Merchants Association have you had occasion to make any studies of transit systems in the United States or this immediate area and—I will ask you that question first for either an affirmative or a negative answer.

A. Yes, I have.

Q. How did you come to make those studies?

A. Because of its effect on the retail business.

Q. Who directed that you make those studies?

A. I did it on my own.

Q. In what parts of the country have you made such studies and about how many have you made?

A. Well, I have watched transportation in a number of cities, in London, Paris, Rome, of course New York, Philadelphia, St. Louis.

Q. Can you tell the Court about what length of time you were engaged in making each of these studies of these various transit systems? How long would it take you to make and complete one study?

A. Well, the type of study we are after, the methods and the movement of people, it would take a day or two in each city.

Q. In order to shorten this, could you tell us in your own opinion what is the most complicated transit system you [fol. 124] have ever made a study of?

A. The most complicated?

Q. Yes, municipal transit, public transit system?

A. I believe London.

Q. Have you ever made a study of the transit system in Los Angeles?

A. Not completely. I have looked at it carefully on several occasions but I did not make a study of it.

Q. Have you made a study of a transit system which would be comparable in your opinion to that transit system which is now carried on in the City of Kansas City and its environs?

A. Yes.

Q. What city was that and how closely would the population approximate Kansas City?

A. St. Louis and it would be approximately twice the size of Kansas City.

Q. In making your study of the transit system in St. Louis did you have occasion to study the effect of a mass transit strike on the movement of employees and people generally in and out of the downtown area of St. Louis?

A. No, sir, I didn't in St. Louis; I did in Philadelphia.

Q. Would you relate briefly to the Court your study in Philadelphia of what facts you found and what conclusions you reached?

A. We found that business in Philadelphia was decreased retail-wise better than 40 per cent and the number of [fol. 125] employees were reduced approximately 15 per cent and the oddest thing was that it decreased the number of people who went to parking lots, the reason for this being that they thought that there would be a considerable traffic jam and "I just can't make it so I won't even try."

Q. Have you made a study of the transit system in this City of Kansas City?

A. Yes, sir.

Q. How long ago did you make that study?

A. The last survey we made, I believe, was in 1956. At that time we determined that 65 per cent of our employees came by transit to work.

Q. How long were you engaged in that 1956 transit study?

A. That survey took, I believe, about four or five days.

Q. How many people were engaged in making that study?

A. I do not know because it was purchased and was made by Community Studies.

Q. Could you tell us something about Community Studies, what type—

A. It is an organization that makes a business of making surveys of various types.

Q. Where is that organization located?

A. In Kansas City.

Q. Were you in Kansas City on November the 14th and 15th when the mass transit strike was in effect here?

A. Yes, sir.

[fol. 126] Q. Did you have occasion to observe the effects of that strike on the downtown area in Kansas City?

A. Yes, sir, I did.

Q. From your observation what did you find?

A. We contacted a number of stores to find out how their business was and we found that the reduction in business in the least was 10 per cent and in the majority between 30 and 40 per cent.

Q. Can you give your expert opinion as to what effect a prolongation of this strike would have had on this City of Kansas City?

A. Based on what has happened in other cities, why, we could expect at least a 30 per cent reduction for a considerable length of time.

Mr. Dunau: In what, sir?

The Witness: Sir?

Mr. Dunau: A 30 per cent reduction in what?

The Witness: In sales.

By Mr. O'Malley:

Q. And what do you mean by a considerable length of time? Over a period of weeks, months or—

A. Over a month.

Q. Can you tell the Court from your experience how any damage which may be done by a prolonged strike of this

nature, how that damage can be repaired, if at all, how can we recoup or how can merchants recoup, how can anyone [fol. 127] affected recoup, if possible?

Mr. Dunau: I object to the question. I think we should have a more particular definition of what damage means before the question is permissive.

The Court: I think I understand what he means.

Overruled.

The Witness: I can answer it!

By Mr. O'Malley:

Q. Yes.

A. I don't believe it can ever been recouped. I remember when I first came into the retail business I thought that we all bought the things that we needed and what we don't buy today we buy tomorrow. After being in it as many years as I have I find that is not true. The sale that is not made today is never made. I will illustrate it this way. Suppose I have \$5.00 in my pocket and tomorrow is pay day and I go down the street and I see a good-looking tie in the window and I decide "I'll buy it". As I go to the entrance of the store a friend of mine comes along and says, "Bill, we are going to have a poker game tonight. Come on and play poker." So I say, "Fine". So I keep the \$5.00 to play poker. Now, if I lose the \$5.00 I never buy the tie.

Q. Mr. Austin, in the event of a prolonged transit strike of the Kansas City Transit, Inc., is it your opinion that such a strike would or would not seriously affect the public interest of the people in this city?

[fol. 128] Mr. Dunau: I object to the question, Your Honor, I hardly see that this witness is qualified to testify whether a prolonged strike in mass transportation in K. C. would jeopardize the public interest, safety and health.

The Court: Sustained.

By Mr. O'Malley:

Q. Now, Mr. Austin, you testified that you lived in the city for 60 years?

A. Yes, sir.

Q. You have been in the mercantile business, you have been with the Merchants Association for over 30 years, and for that entire 60 years you have lived here and have acquainted yourself with the daily moving in and out of traffic into Kansas City?

A. Yes, sir.

Q. And is it from that knowledge over that number of years that you draw your conclusions that you have made here before this Court?

A. Yes, sir.

Q. Do you recall any previous strike by the public transit system in the city?

A. Yes, sir.

Q. When was that?

A. In 1918, I believe.

Q. Do you recall the transit system strike in 1950?

A. In '50?

Q. Well, I will withdraw the question.

A. I do not.

Mr. O'Malley: I believe that's all, Mr. Austin.

[fol. 129] Cross examination.

By Mr. Dunau:

Q. I have a few questions, Mr. Austin, please. Mr. Austin, I believe you told that there are 58 members in your association?

A. Yes, sir.

Q. Are all those members located within the State of Missouri, sir?

A. Yes, sir.

Q. Would you describe for us the kinds of businesses these 58 members operate?

A. They are department stores, mail order stores and specialty stores.

Q. Engaging in conventional retail distribution?

A. Yes, sir.

Q. Ties, handkerchiefs—

A. Hard goods.

Q. Pots and pans?

A. Yes, sir.

Q. Tires for automobiles?

A. That's right.

Q. You mentioned that there was transportation, mass transportation other than Kansas City which was inter-urban lines. Will you describe that for us, please?

A. I do not know the names of the lines but you know the lines that serve Prairie Village and Mission, Kansas.

Q. Do they operate from Missouri into these locations?

A. Yes, sir.

Q. And they operate from those locations into Missouri?

A. Yes, sir.

Q. And the strike of Kansas City Transit does not affect those operations?

A. No, sir.

[fol. 130] Q. Do you know how many passengers these operations carry?

A. No, I do not.

Q. Is it a substantial number, sir?

A. I would not say so.

Q. Did you make a personal study of the transportation strike in Philadelphia, sir?

A. Yes, sir.

Q. When was that?

A. Five or six years ago, I believe, I am a little hazy on the exact date.

Q. Were you in Philadelphia at the time of the strike?

A. I was in New York—

Q. You were not in Philadelphia?

A. —and the strike took place so I left New York and went to Philadelphia to witness it.

Q. So you were in Philadelphia at the time the strike took place?

A. In Philadelphia at the time of the strike, yes, sir.

Q. How long were you in Philadelphia observing that strike?

A. Two days.

Q. What was the duration of that strike, sir?

A. I could not honestly answer.

Q. From whom did you acquire your information in

Philadelphia with respect to the effect of the strike in Philadelphia?

A. Who did I get—

Q. From whom did you acquire your information?

A. What way do you mean?

[fol. 131] Q. Well, you told us for example that there was a decrease—

A. Decrease in business?

Q. —of retail business.

A. I had luncheon with a number of the merchants and they gave us the information.

Q. And this is the extent of your study with respect to the decrease in business?

A. With them and with the head of the Merchants Association.

Q. So you were told in a luncheon meeting by these merchants that they had suffered a 40 percent decrease?

A. Yes, sir, which was afterwards substantiated by the figures that the merchants reported to the Federal Reserve Banks in their district each week.

Q. As to the sales that week?

A. As to the sales.

Q. How did you determine that the decrease in sales was attributable to the strike?

A. Well, the weeks before and the weeks after the strike there was that much difference in business.

Q. Did your study indicate whether hospital services were curtailed in Philadelphia?

A. No, sir.

Q. Your study did not indicate that?

A. No, sir.

Q. You made no study of it?

A. No, sir.

Q. Did you make a study as to whether prisons and police stations continued to function?

A. No, sir.

[fol. 132] Q. You made no such study?

A. No, sir.

Q. Did you make a study as to whether utility companies continued to operate normally?

A. No, sir.

Q. Your study then was confined to whether retail sales of handkerchiefs, ties and such items were reduced or increased during the strike?

A. Yes, sir.

Q. Now, you testified that during the two-day strike in the Kansas City area you contacted members of the Association and asked them what their experience had been with respect to retail sales during those two days?

A. Yes, sir.

Q. And they reported to you at least a 10 per cent decrease?

A. One store was 10 percent.

Q. What was that store, sir?

A. That one store was—well, do I have to answer that? I am giving away information that is given to me in confidence.

Q. Well, you have testified with respect to this information, I think you are obligated.

Mr. O'Malley: I don't believe the witness testified with respect to figures of any one institution, any one commercial establishment. I think that might be going too far. I certainly wouldn't ask it of him and I think to ask it in cross-examination is exceeding the direct examination.

The Court: Is it some trade secret that you would prefer [fol. 133] not to divulge?

The Witness: Whenever the stores give me information concerning their volume, it is understood that I am not to divulge that so that any other store knows it. They are very secretive about their volume from each other. Your Honor, I could answer what type of store it was.

The Court: That suffices.

Mr. Dunau: I think perhaps it might.

The Witness: A department store.

By Mr. Dunau:

Q. A department store?

A. Yes, sir.

Q. Was your information with respect to the 30 and 40 per cent decrease of others also department stores?

A. Yes, sir.

Q. How would you account for the difference between a 10 per cent of one department store and 40 or 50 per cent in the other?

A. It might be in the previous years, and remember they make their comparisons, the stores do, on previous years for that particular date, that the previous year this particular store may have had some very low figures to go against. That's the only way I can answer that particular one because the average was 30 to 40 per cent.

Q. Did you make an inquiry at the end of the week during which the strike took place to ascertain whether considering [fol. 134] the total sales that week there had been any decrease over the comparable period the preceding year?

A. I did not. I referred to the Federal Reserve figures for the week.

Q. What did you find when you looked at the Federal Reserve figures?

A. There was a decrease.

Q. Of about what?

A. I believe it was 13 per cent.

Q. So that over the course of the week there had been evidently a recoupment of at least 27 per cent in those stores which had experienced the 40 per cent decline during the two days?

A. We had three days at the end of the week that were very good days.

Q. So that on the basis of the reports to you, the net effect of the two-day strike was a 13 per cent decrease in retail sales in Kansas City, is that correct, sir?

A. That's correct.

Mr. Dunau: I have no other questions.

Mr. O'Malley: I believe that's all. Thank you, sir.

(Witness excused.)

[fol. 135] GERALD H. FRIELING, being sworn, testified:

Direct examination.

By Mr. O'Malley:

Q. Will you state your full name to the reporter, please?

A. Gerald H. Frieling.

Q. Where do you live, Mr. Frieling?

A. 901 West 96th Street, Kansas City, Missouri.

Q. What business are you in?

A. Manager of the Downtown Committee of the Chamber of Commerce at the present time.

Q. How long have you been with that organization?

A. Slightly over a year.

Q. What employment or service were you in prior to that time?

A. Just prior to it I was in consulting engineering about five years.

Q. What type of consulting engineering did your firm do?

A. Traffic and transportation.

Q. What was the name of your firm, if you were with a firm?

A. The first part, or about the first year, I was with Ebasco Services, Inc., of New York; I acted as consultant on operations for the Department of Government Transport in South Wales, Australia, and after the first year, when that work was completed, I did traffic and transportation work for Wilbur Smith and Associates of New Haven, Connecticut.

Q. Are you acquainted with the Kansas City Transit, Inc., a corporation which operates the transit system in Kansas City?

[fol. 136] A. Yes, I am.

Q. How long have you known of that association or corporation?

A. Prior to going into consulting work, I was an employee of that firm for approximately thirty years.

Q. While you were an employee of the transit company here in Kansas City during a period of thirty years, did you ever have occasion to deal with their problems of trans-

portation in the face of a possible stoppage of mass transportation?

A. Well, the first part, I can say yes, because I happened to be in charge of transportation during the last ten years or so, being the vice president in charge of transportation. When you say in charge of the stoppage, during that time we did have occasions during negotiations when we did not always agree, and during one or two occasions we were seized by the State of Missouri, but during the time that I was employed by the company, we had no strike.

Q. As a consulting engineer, in dealing with matters of transportation, can you tell the Court on how many occasions you have studied transportation systems in various cities of this country?

A. You say during the time that I was employed by the transit system?

Q. No, while you have been a consulting engineer.

A. Oh. Of course, the first year, as I say, was entirely on the Australian problems, in New South Wales, being based [fol. 137] at Sydney, and also while I was there I was asked to do a little private work in Melbourne on that, rapid transit systems, as well as surface transit. After that I did some transit work in several cities in the United States, including many cities around the Los Angeles area, and Phoenix, and Hartford, Connecticut, and Reno, Nevada, and several places around.

Q. Are you able to compare the transit system operating in Kansas City with the transit system in any other particular city as to its size?

A. Well, there are several cities that might be compared to Kansas City as far as the transit system is concerned, including Cincinnati, possibly New Orleans, Denver, San Antonio, Dallas. I would say any of those might be somewhat comparable to Kansas City.

Q. Now, have you made a particular study of the transit system in any of those cities you have just mentioned?

A. Not as a consulting engineer. During the time that I was directly involved in transit work, we, of course, made studies as part of our everyday work to compare the operations in other localities.

Q. In the event of a sudden stoppage of mass transpor-

tation, public transportation, in Kansas City, tell the Court if you know just what means of transportation are available to people who must come to the downtown area of Kansas City, in and out.

A. Well, I might say that during the war, as we all [fol. 138] know, transit demonstrated its importance, and most people who traveled had to go by transit at that time, because they restricted automobile travel. Since the war, there has been a great increase in road construction, particularly of the freeway type, and there has been great increase in automobile use, and as a result there has been a decrease in transit travel during that time. And during that period there seemed to be in the minds of many people that perhaps the automobile could handle most of the travel. Recently, however, there seems to be a trend in the minds of thoughtful people that perhaps is not true, and it is evidenced by the recent actions taken in the Congress of the United States in which they have recently appropriated large sums towards the development and study of transit and suburban trains; and the cities themselves, that I have come in contact with in the last few years, have indicated that they desire the balance of transportation, believing that particularly in the downtown areas that some form of transportation, like mass transit, was desirable and a practical necessity to carry the people downtown that they felt that they should have and had been accustomed to coming downtown to work and to shop. That without, having the downtown spread over such a large territory, that it would discourage people from coming downtown.

Q. What is the membership of your Chamber of Commerce [fol. 139] of which you are one of the officers here?

A. I don't know whether I can give you that. I believe that it is about 5,000, but the Downtown Committee, which I manage, is an autonomous committee of the Chamber of Commerce in that it operates on its own, soliciting its own funds and electing its own officers and governing its own affairs; and although we are known as the Downtown Committee of the Chamber of Commerce, we cooperate with them very closely, we do operate independently.

Q. Did your committee have brought to its attention the

impending work stoppage of the transit company here in Kansas City on November the 14th and 15th, this year?

A. Yes.

Q. How was that knowledge brought to your committee?

A. Well, it really was brought to the committee by myself, by seeing the notice of it in the paper and also hearing of it on the air.

Q. Well, as head of your Downtown Committee, what action, if any, did you take in relation to that public notice that you saw?

A. Well, as far as the action that was taken, that was taken primarily by Mr. Austin's group, because that is the group that is affected as far as the shopping, and they will feel it first. As far as the people who work in the downtown area was concerned, I was asked to serve on a committee appointed by Mayor Bartle, which would act, if the [fol. 140] strike continued, to take certain action dealing with staggered hours and anything else that they believed was necessary to keep the traffic flow somewhere near normal in the city.

Q. At just what time were you asked to serve on that committee?

A. Mayor Bartle acted very shortly after the strike was called. As I recall it, it was either that same day or early the next day.

Q. Have you ever held any official position in the State of Missouri, Mr. Frieling?

A. Yes, I was fortunate in being appointed a member of the State Board of Mediation at the time it was formed in 1947 and was reappointed to it after each term until I resigned in 1956 at the same time I resigned from the transit company to go into consulting work.

Q. Did your committee which was appointed by Mayor Bartle have any meetings on November 14, 15, and 16, of this year?

A. It did meet once to discuss this matter and that was all.

Q. How many people on that committee?

A. I believe there were nine.

Q. Do you recall the names of any of the members? Give us the names if you remember them, please.

A. There was Mr. Dwight Bedell, Industrial Commissioner of the Chamber of Commerce, who was acting concerning industry; Mr. Austin, who you just have heard, who was acting in terms of the merchants; Captain or Lieu- [fol. 141] tenant Colonel Jamison of the—or no, it was Canaday of the Police Department; and City Manager Robert Weatherford, who was to be chairman of the committee; and Roland V. Petering who is an officer of one of the banks and member of the advisory commission; and O. J. Falin, who was the Director of Traffic for the City. Any other names that happened to be on this committee do not come to me at this time.

Q. You have indicated, have you not, to the Court, that you served as a member of the State Board of Mediation for nine years, about 1947 to '56?

A. Nine or ten years. It's almost ten, as I recall; I think I was appointed in October and served until about September of '56.

Q. Are you able to give an opinion to this Court as to what effect a prolonged strike of the Kansas City Transit, Inc., might have on a city the size of Kansas City; in fact, in this city?

A. Well, it probably would have a great effect in two ways. First, it would have a very detrimental effect upon the company itself. I think a prolonged strike would certainly hurt the company very much by the loss of earnings, and even though possibly during that time they wouldn't have any wage payments, at the same time they would have a lot of expenses going on, and much of that business, or all of it, in fact, couldn't be recouped, and you would find [fol. 142] them at the end of a prolonged period in very bad straits. As far as the people are concerned, I think it would have quite an effect. In comparing facts which might be asked about at this hearing, I glanced over a report or a study that was made by the firm that I was associated with a few years ago, the Wilbur Smith and Associates, who made the origin and destination studies for the Highway Departments of both Missouri and Kansas from 1957 to 1958. I find that the—

Q. Let me ask you this: Did that study have any direct bearing on the Kansas City Transit, Inc., in Kansas City,

its movement on the streets and carrying of population, and so forth?

A. Yes, sir. The study included a—

Mr. Dunau: May I interpose an objection? If the witness is simply going to report to us a study of which he knows nothing except what he has read, I do not think this is competent on the question of a strike in mass transportation in Kansas City.

The Court: I don't think it is responsive to the question.

By Mr. O'Malley:

Q. Mr. Frieling, did you take any part personally in making this study that you have referred to?

A. Yes, I did. Being with the firm, we conducted similar studies to this in Phoenix and that area, and Reno and [fol. 143] that area, of which—and Riverside, California, of which I was also a part, and as such, those studies being completed prior to the time this study was completed, I was asked to stop here on my way to headquarters in the East and complete this study and close up the office. I was here about seven or eight months at the completion of this and am fairly well acquainted with it.

Mr. O'Malley: If the Court please, may the witness now go ahead and report on the study?

Mr. Dunau: Well, if the witness is going to report what he did with respect to acquiring information pertaining to transit in Kansas City, I have no objection to that, but if he is simply going to relate what is in a report, then I do object. I take it that what the witness is now going to state is what he, himself, has done with respect to a study pertaining to Kansas City.

The Court: He may refresh his recollection.

The Witness: Do I answer?

The Court: You may go ahead and answer.

The Witness: The point I was going to make is that in this study we found through interviews that there was approximately 64,000, or about 29.5 per cent of the people who traveled the day before we made the interview, traveled by transit in the downtown area, and I just wanted to compare that with the actual studies and checks that were made

[fol. 144] at our request by the transit company, which showed that there were 56,000 people traveled inbound to the central business district, and 55,900 outbound, from 6:00 a.m. to 10:00 p.m., and one part that we were intensely interested in was the people coming in what we might call the rush period in the morning, which was 6:00 a.m. to 10:00 a.m. We found there was 26,700 that were checked inbound. And to answer your question then directly, on the basis of this, on taking a general average which we have found in many of these studies, that there is approximately 1.5 persons per auto, in many of these it would indicate that if these people who rode transit during these three or four hours in the morning rush coming towards the downtown areas all rode automobiles, it would mean that there would be approximately 17,800 automobiles to transport those people into the downtown area, which is approximately as many parking spaces as we have around in the central business district at the present time. Now if—and which we often use, about 350 square feet per parking space—we found parking space at that square footage for all those automobiles, it would mean we would have to add about 6,230,000 square feet of parking space in the downtown area to take care of them. Now to give you an idea of what that would mean, it would mean that in some work that I have done recently, in some of the garage work, that [fol. 145] we take a 5-story high rise garage that will house somewhere around 500 cars, that will take about 62 or 63 thousand square feet, so that, roughly, we would have to build about a hundred of those garages in order to house these many automobiles, which, of course, is probably out of the question.

Now the question is just what this would mean and how we would get these people downtown, and so I was concerned with the peak hour of transit, and I found that during this same period in which the check was made inbound that there was 12,000 transit people came down in the peak hour. Applying that same 1.5 persons per auto would equal about 8,000 more autos during that peak hour. And also, on my experience of finding what the capacity had been in cities of this kind, I take a general flow of approximately 400 vehicles per lane per hour, and it would mean that we

would have to have 20 more traffic lanes coming into the downtown area during that peak hour to handle that many automobiles.

Now, I would say that to get that sort of thing accomplished would be a thing that wouldn't be done over night, and that a transit strike over a prolonged period would, of course, then have a very detrimental effect upon the downtown area.

By Mr. O'Malley:

Q. A moment ago you related to the Court the effect of [fol. 146] a prolonged strike on the company. Now, as a long-time employee of the company, will you tell the Court what effect, if any, a prolonged strike would have on employees of the company, assuming that the company employs around 800 people?

A. Well, I think that possibly I might answer that by stating what I understood when I was within the transit work, that some companies that have had prolonged strikes have indicated that many employees sought work elsewhere during the period of that strike, and so that when the work was finally resumed, why, there were quite a few people who did not return. I think it goes without saying, also, that if a strike continues for a long period of time, unless those employees have outside income, either private income of some kind or by receiving benefits from the union, that they would suffer materially.

Q. Now, you spoke of some employees that might not return after a prolonged strike. Concerning that type of employee, are they easily replaceable by the company?

A. Well, not always. The company usually has a training period that runs over, very often, several weeks, and even after that, why, they believe that it takes several months at least before an employee becomes a man proficient in that work.

Q. Are you acquainted with what action, if any out of the [fol. 147] ordinary was taken by the police department of this city during the two-day strike on November 14th and 15th toward moving traffic in Kansas City, which wasn't taken ordinarily but had to be taken at that time?

A. On one part I can only report on what I understood, that they put more policemen on the streets. My observation was to that effect, that there were many policemen stationed at intersections that normally do not have policemen, and at those busy points they did turn off the traffic lights and the policemen did direct the traffic manually during the rush periods.

Q. Speaking from your experience as a member of the State Board of Mediation, also as a long-time employee of the transit company in Kansas City, also as a consulting engineer in transit problems, please tell this Court whether or not in your opinion a prolonged strike of the transit company here in Kansas City would or would not cause irreparable damage.

Mr. Dunau: I object, Your Honor. I do not believe this witness is qualified to testify with respect to opinion in such general terms.

The Court: Sustained.

By Mr. O'Malley:

Q. Mr. Frieling, has the committee that you were appointed to by Mayor Bartle been disbanded yet?

A. I have not received notice that it has.

[fol. 148] Q. Was that committee an emergency committee?

A. I would call it that.

Q. Why would you call it that?

A. I think it was designed to act in regard to this particular situation.

Q. Will you give your opinion as to whether or not a prolonged strike—do you have an opinion as to whether or not a prolonged strike in Kansas City of the Kansas City Transit, Inc., would seriously affect the public welfare here in Kansas City?

Mr. Dunau: That is the same question, Your Honor, to which objection has just been sustained.

The Court: I will sustain the objection.

Mr. O'Malley: I believe that is all. Thank you, sir.

Cross examination.

By Mr. Dunau:

Q. I believe you told us, sir, that the committee appointed by Mayor Bartle recommended a system of staggered hours in order to keep traffic normal, is that correct, sir?

A. No. What I said was that the committee appointed by Mayor Bartle was to consider measures such as staggered hours, in case that they felt it necessary to invoke certain measures.

Q. Would you describe for us what the staggered hours aspect of the relief consists of?

A. That would have meant that if the strike had been [fol. 149] prolonged and it seemed necessary to stagger the work hours of the people in the city in order to effect a better flow of traffic in those hours, those changes in hours would have been requested of the firms.

Q. Now, you say if the strike had been prolonged. How long would the strike have had to last before the committee would see fit to recommend staggered hours?

A. I believe that would have taken place rather promptly.

Q. Well, the committee did not make such a recommendation during the two-day period of the strike?

A. Not during the two-day period, no.

Q. How much longer would the committee have waited before it made such recommendation?

A. I am not chairman of the committee, so I don't feel as though I should speak for him, but if you want my own opinion, I would give that.

Q. You did tell us that this would be requested after a prolonged strike, and what I am attempting to ascertain now is what you mean by a prolonged strike. During what period after the commencement of the strike would you regard it as necessary to invoke a staggered-hour system?

A. My own opinion in this particular instance, referring only to the staggered hours, my opinion would be that it would have been requested within the next day or two.

Q. I see. And if a staggered-hours system were put into [fol. 150] effect, what, in your opinion, would have resulted in terms of traffic flow in Kansas City?

A. We had hoped that it would help the traffic flow by spreading out the work hours of the people in the congested areas.

Q. Did the committee have any concern that people would not be able to get to work?

A. Oh, yes, I think so.

Q. How many people did you estimate would be unable to report to work because of the absence of mass transportation?

A. As far as I know, there was no estimate made.

Q. In fact, how many—did you have any information as to whether any people failed to report to work during the two days of the strike?

A. Only from what we heard, that there had been some that did not report.

Q. And how many was "some", sir?

A. I have no idea. Just the general idea that we heard that there were some people that were unable to make it because they were not able to arrange for group rides and had no other way of getting down, being in the income group, you might call them, who did not own automobiles.

Q. When you say that you had reports that some people were unable to come to work, do I infer correctly that most people were able to get to work?

A. I think that is probably true.

Q. Now, you told us that on the basis of a study, you [fol. 151] found that a car carries 1.5 passengers, is that correct, sir?

A. That's a pretty good average.

Q. And it was on the basis of that average of 1.5 passengers that you estimated that you would have to have 17,000 automobiles coming into the downtown Kansas City area in order to carry the normal traffic flow in to the downtown area in the event of a mass transportation strike, is that correct, sir?

A. I said that it would take—on the basis of 1.5 persons per auto, it would take that many autos to transport the 26,700 people who came by transit into the downtown area between 6:00 a.m. and 10:00 a.m. And assuming, of course, that those people were the ones coming down to work and to shop at the first part of the shopping day, so that they

could not group ride any more than what the 1.5 persons per auto would indicate.

Q. Now, suppose they were group riding; do you make a study of what the number of cars would have to be in order to get the normal flow of traffic into Kansas City?

A. No, but that would be very easy to do, because you could group ride it up to the point of the capacity of the automobile, instead of 1.5, if you could assume that to be done.

Q. Now, isn't that one of the methods that was, in fact, suggested to relieve any possible disturbance in the flow [fol. 152] of traffic, group riding?

A. It was done, there is no question about that.

Q. So when you have group riding, your 1.5 is not a representative figure, is that correct?

A. For the time being it would increase somewhat above that, yes.

Q. Substantially above that, would it not, sir?

A. That all depends on how well that they can put that group riding plan into effect. During the war we found it difficult to do in many instances.

Q. Now, you also indicated, as I understood it, that this problem of 17,000 automobiles, which your study indicates would be necessary to transport people into the downtown area in the event of cessation of mass transportation, would become a problem only after a strike was prolonged; is that correct, sir?

A. It would become critical after that prolonged time, yes.

Q. How long would it have to take before it became critical?

A. I think that possibly a week or two, because to start with I think some of the people would not come downtown. It would relieve part of that. But again, I assume that your question is concerned with getting as many people downtown as we had in the first place, and if all the people then tried to get back out of town, it would probably take a week or two for them to do that, and if they came down at [fol. 153] that time, it would take these many automobiles to do it.

Q. Now, you say there are 26,000 people coming down town during these peak hours. Of that number, how many are coming to work?

A. The City Plan Commission made a study in 1957 that showed approximately 66,000 people working in the core area of the downtown section, and there was about 25,000 or so in the fringe area of the downtown area. So that in the central business district and the fringes that I think would be served by the transit firm there would be approximately 90,000 employees.

Q. Well, but I am talking about this 26,000, sir.

A. Yes. And from what surveys have been made, I think Mr. Austin mentioned one in 1956 that he showed 65 per cent riding transit, which would mean—take about six tenths of the 90,000, you will get about 50,000 people that would be riding transit if they came in there.

Q. I don't quite understand that. I thought we began with a figure of 26,000 people coming into the downtown area during the rush hours in the morning.

A. That's right.

Q. Now, it cannot exceed 26,000 people if we begin with that premise.

A. That's right.

Q. How many of those 26,000 people who came down [fol. 154] during the rush hours in the morning are going to work?

A. I would have to just make an estimate of that, because I don't know of any case in which these people were actually asked whether they were coming down to work or to shop, but inasmuch as the stores do not open until 9:30 for shopping, my guess would be it would be probably 90 per cent or so of those people would be coming down to work.

Q. Is your opinion with respect to the problem that might be created by cessation of mass transportation confined to the problem that would be created in the downtown district of Kansas City, Missouri?

A. Primarily so, inasmuch as downtown, I think, depends upon transit more than any other part of the city, and I think transit depends on downtown also more than any other part of the city.

Q. Aside from that area then, no emergency could be

considered to be in being as a result of a mass transportation strike?

A. I wouldn't say that wholly. I think the industrial plants are also affected by the cessation of work in this case.

Q. Did you make any study with respect to whether industrial workers were able to report to their plants during the period of the strike?

A. I did not personally, no.

Q. You do not know their information on whether there would be any interruption of people reporting to work to [fol. 155] industrial plants?

A. I do not have that direct information.

Q. Do you know whether hospital employees were unable to get to work during the strike?

A. What kind, please?

Q. Hospitals.

A. Oh, hospitals? No, I do not; I made no—

Q. Did the committee receive any reports that hospitals were being understaffed as a result of their employees not being able to get to work?

A. The committee would not receive word from that, inasmuch as they are a downtown committee.

Q. No, I am concerned with the committee that the Mayor set up.

A. Oh. I don't know. You will you have to seek that information from the committee itself.

Q. Do you have any information with respect to whether public utilities like gas, light, telephone company employees failed to report to work?

A. I do not have any definite information.

Q. Do you have any information with respect to whether policemen failed to get to their jobs?

A. I do not have that information.

Q. Do you have any information with respect to what the actual traffic flow was during the two-day strike?

A. My observations are what I have on that. I did drive [fol. 156] around many parts of the city during the rush periods and did observe quite a bit of congestion at certain locations, which I believe did not exist before the transit strike started.

Q. Sir, I want to read to you from a news article in The Kansas City Times of Thursday, November 16, 1961, column 4, page 2. This news article quotes Colonel William Canaday, Superintendent of Operations for the Police Department, and this is the question: "We had a few bottle-necks, as we usually do, but they were straightened out quickly. We had traffic supervisors in the field all over the city watching the situation. They reported that everything seemed to be moving smoothly. The principal tie-ups occurred, again briefly, in the vicinity of 31st and Main Streets and at 31st and The Paseo, but we had enough men assigned in those areas that we got things moving quickly. We kept extra traffic control men on duty." Again, is your observation with respect to traffic flow in accord with what is reported to be Colonel Canaday's observations?

A. I agree with him that the police did an excellent job. From my observations I do repeat that at certain locations there was tremendous congestion and traffic moved very slowly through that area, and it took considerably more time to go through than it did prior to the strike.

Q. Do you agree with him that in general everything [fol. 157] seemed to be moving smoothly?

A. I don't know what you mean, "moving smoothly". There was no serious accidents as a result of it. It just took more time.

Q. How much more time, sir?

A. Well, in one particular instance that I timed myself on, it took just about twice the time.

Q. How much is twice the time, sir?

A. Instead of taking 20 minutes it took 40 minutes.

Q. So if one started 20 minutes earlier, one would get to where one wanted to go on time?

A. That's right.

Mr. Dunau: I have no other questions.

Mr. Siddens: That is all.

(Witness excused.)

H. ROE BARTLE, being sworn, testified:

Direct examination.

By Mr. Siddens:

Q. State your name, please, sir.

A. H. Roe Bartle.

Q. What is your position?

A. I am the mayor of Kansas City, Missouri, sir.

Q. How long have you been mayor of Kansas City, Missouri?

A. Six years, eight months, nine days.

Q. Mr. Mayor, you are, I am sure, aware of the recent strike that occurred on the Kansas City transit system on the days of November 14 and 15, 1961?

A. Yes, sir.

[fol. 158] Q. I would like for you to tell the Court what steps, what action you took with relation to that strike.

A. Well, in accordance with the authority given me by the ordinances of the municipality, I, as the titular head of the city would be called upon to impanel a group of experts in the field of transportation who might be able to devise ways and means of moving the populace with dispatch and order, if public transit was not available for them. Such a committee was impaneled and was instructed by me and their terms of reference prescribed, and within a matter of hours after they were impaneled, a temporary injunction was granted, and as a result they have been inactive from that day to this.

Q. Mr. Mayor, from your observations, what effects with relation to the mass transportation of people in Kansas City, Missouri, occurred as a result of this strike for two days?

A. Of course, speaking very personally, and that is my telephone, the number of people who would call the mayor, thinking that by magic he can put buses back on the street, to the point where—the populace, I realize, are wholly without knowledge, if Your Honor please, but they felt that the mayor had supreme power and the buses ought to be moving right now, if only he would tell them to move. There

was no question in my mind on the basis of the reports which I received from merchants that the sales were down. [fol. 159] Secondly, there were a number of individuals who felt that we should make transportation available to them through the emergency vehicles that are operated by the municipality, to wit, police cars, fire cars, those that are related to public works, and park department, water department, and the like. Most of the calls, and we kept two people on the phone constantly, were primarily from either employees in industrial plants or housewives that wanted to come to town.

Q. You mean that you got calls telling you that they could not get to their work?

A. That is correct, sir.

Q. And did you have many of those calls or not?

A. Well, our lines were jammed. I mean as far as the mayor of the city was concerned, I was involved from the time that our transit workers left the scene of action until they returned to their post of duty. There was practically nothing done, as far as I was concerned, except to try to help the public to understand that this was still America and if people wanted to strike they had that right and that privilege.

Q. Did you get any calls from people that wanted to go to doctors or hospitals and were unable to make it?

A. I had several calls of that nature in which we dispatched ambulances to take them to the hospitals, though they were not normally ambulance cases, but they indicated [fol. 160] that they were to have treatment of one kind or another and if they didn't get it that it would be an acute situation, and I felt that there was no need of arguing with people, time was of the essence, and that the city ought to try to cooperate and try to keep people as happy as they possibly could, if they were suffering from a physical disability or an ailment.

Q. From your experience as mayor, what effects would occur if this strike had continued for a prolonged period of time, say a month or two months or three months?

A. Well, Counselor, I think it would be very difficult for me to tell the Court what the true effect would be. That I do not know; I could only predicate an answer on the basis

of a spirit of unrest. When I called for group riding, which I did, through all news media, people were cooperative. I asked them to go to the normal bus stop to be picked up, and that happened, and people were helpful. I received calls saying that they didn't mind being put out for a day or two or three, or a week of waiting an hour to take somebody to work or to wait an hour to pick them up and bring them home, but it got to be monotonous after even a couple of days. I think we would have had some real difficulties in the matter of group riding. We had it during the war, and I think there is a lot of difference in war and in a local situation that affects only a city or a metropolitan area.

[fol. 161] Q. Now, you did call your committee together and they met to consider what measures could or should be taken. Did they not advise you with regard to that?

A. Yes; and I called them together on the basis of what they represented. I had the chairman of the Mayor's Advisory Committee on Traffic, Mr. Roland Petering, vice president of the Merchants Bank and Trust Company; and I had, which is required by ordinance, the Director of Traffic, which is Mr. Jack Faliñ, traffic engineer. It is also required that the City Manager act as the chairman of the committee after the Mayor appoints it, and this committee advises the Mayor as to what they shall do. And I selected Mr. Frieling, representing the Downtown Committee; I asked Mr. Austin, representing the downtown merchants; I asked Mr. Bedell, representing the Industrial Commission of the Chamber of Commerce, being Industrial Commissioner and knowing all the industrial plants in the periphery of Kansas City; I had Colonel Clarence Kelley, the Chief of Police; I had Lieutenant Colonel William Canaday, Chief of Operations of the Police Department; I had Mr. Harry Woodard, who is the president of the Building Managers Association, for in downtown Kansas City I felt that the building managers would have to cooperate if we were to invoke the ordinance which would require group riding and a staggering of hours.

Now, when I set up the terms of reference for this committee, Your Honor please, I merely asked for advice, and I said, "I do not want to invoke any of the authority that is granted to the mayor unless it becomes absolutely essen-

tial and necessary." I do not believe in trying to regulate the public unless it is a real crisis; and I sensed that the public was cooperating in this matter. I might say—it was not illegal, I would say it was extra-legal. I may have gone above and beyond my duly constituted authority, but the ordinance says the taxicabs can only take one fare, or if you have a party, only your party can ride in a taxicab. I did call all of the taxicab operators in Kansas City and said, "Your drivers can pick up as many people as they want, as long as they do not overcrowd their cabs; they may collect fares from all who are involved." I felt we were rendering a service to the public. I did not in any fashion want to favor the taxicab companies, but I did want to favor the public.

Q. Now, was it your view that if this strike had continued, or if, in fact, it should be resumed, would you feel it necessary to assume new measures to cope with the problem?

A. I would not assume any new measures, but I think that I would ask the Mayor's Committee as appointed under the emergency order to make their recommendations relative to staggered hours, and I would in all probability invoke it in a matter of 24 or 48 hours if the strike was renewed. I had said to the Committee in prescribing their terms of reference, "I do not want any report from you for 24 hours; I want to see if we can cope with the situation. If we do not cope with the situation in 24 hours, then I want a definite plan that we can put into action in a matter of minutes."

Q. Did you feel that this was in the public interest to do these things?

A. I so thought or I would not have impaneled the group.

Q. And do you feel that this strike endangers the public interest?

A. If I had not so felt I would not have impaneled the Committee nor would they still be prepared to move into action, for I told them that I would give them two hours as an alert, expecting them to meet in my office in case of necessity.

Mr. Siddens: That is all.

Cross examination.

By Mr. Dunau:

Q. Sir, may I ask you a few questions?

A. Yes, Counselor.

Q. I believe you stated that your office had received calls from employees in industrial plants saying that they needed transportation to the plant, is that correct, sir?

A. That is correct, sir.

[fol. 164] Q. Are you able to tell us how many such calls were received?

A. I could not tell you exactly the number of calls, because they were taken by my secretariat and were reported to me. I merely took those calls, Counselor, on the basis that if there were several in one plant, knowing the key personnel in our primary industries, I would call the head of that industry and say, "Will you organize group riding in your plant, please? We want to help if we can, but we believe you can do a better job with your folk than we can by using the news media to get community cooperation."

Q. Did you receive any calls, sir, from managers of industrial plants stating that they were being understaffed during the period of the two-day strike?

A. Only four or five calls, Counselor, from key men who said that some of the personnel who weren't on the job were important to the efficient operation of the plant and he thought something ought to be done about it. Those calls I classified as routine; I did not feel that I could discriminate for or against a big plant or a little plant. I felt that it was a community problem, and I therefore did not involve myself by saying, "What can the city do to help your plant?" because I thought we had to help them all or we couldn't help any of them.

Q. Sir, can you tell me about how many industrial plants there are in the metropolitan area of Kansas City?

[fol. 165] A. Sir, I would have no knowledge without checking the tax books of Kansas City.

Q. As a stranger to your community, can you tell me what the total population is, approximately, of the Kansas City metropolitan area, by which I include Kansas City, Missouri, and Kansas City, Kansas, sir?

A. We will include the metropolitan area, which would include the two Kansas Cities that you mention, the City of Independence, the capital city of this county, North Kansas City, and our bedroom or satellite communities, would run about a million-one hundred thousand. The last best estimate I had was 1,097,000.

Q. Now, are you able to tell us, sir, how many calls you got from people who said they needed transportation to doctors and hospitals and did not have any available?

A. I would merely make an estimate, and the estimate would be in excess of a dozen. On the basis of my own interrogation I discovered that our outpatient clinic, which is a charitable clinic, was off considerably during this period, because 90 per cent of those people do have to depend upon public transportation to get to and from the outpatient clinic. I did not go to any great length to ascertain what the percentage was, or whether it was big or whether it was small. I merely called to see whether or not it was an emergency in which I ought to ask some physicians or [fol. 166] some Public Health people to be in this commission that I set up very quickly to deal with the transportation problem.

Q. And did you have a representative from that group on the committee?

A. No, I did not, sir.

Q. Did you then conclude that that was not a sufficient problem?

A. I did not conclude that it was of sufficient importance at that particular moment. I called one Public Health man, who is a part of the staff of the municipality, and I called a man who is the chief of staff of General Hospital, who is a volunteer physician, chief of the volunteer staff, and asked both of them to make surveys, that if it was necessary I would call them in, but if you will permit me, Your Honor, and Counsel, I want to say that I knew that if I did that, that the news media would pick it up, and I wanted no hysteria in Kansas City, and that is the reason that I did not bring them into the picture. I felt that this is just one of these things that happen ever so often in public life, and there is no need to bring the public to the point of

hysteria when there is machinery set up to try to cope with the problem.

Q. Sir, while I think I quite understand there would be an inconvenience to any city from an interruption of mass transportation, can you, granting that such inconvenience [fol. 167] would necessarily exist, give us your judgment as to whether, if a transit strike were to take place, a system of staggered hours, group riding, extra-legal taxicab riding would be approximately enough to get people to go where they wanted to go.

A. I would say that it would greatly inconvenience the public, and I must say, as a student of the human equation, people in America want not to be inconvenienced. As a servant of the people, Counselor, I must say that everyone feels that the mayor can solve their problems, and whenever there is an interruption in mass transportation, the mayor of this city has headaches extraordinary coming from the public, most of whom do not understand even legal procedures that are involved and the techniques of management and labor.

Q. Would you in your judgment, sir, classify the situation that would result from a transit strike as being that of substantial inconvenience?

A. It would not; I think it would be a great inconvenience to the city, and I think, frankly, that it would have an effect upon the economy of the city, I think our economic structure would be affected. I cannot help but so feel on the basis of surveys that I made with management.

Q. Would you say, sir, that the primary economic effect would be upon retail sales in the downtown area of Kansas City?

[fol. 168] A. That is definitely correct: It would be advantageous to shopping centers; it would certainly hurt the hard core of the city which is known as downtown Kansas City, our large stores doing a retail business. I do not think that a transit strike would in any way affect distribution or wholesale in any fashion, only in minor ways.

Q. Whose services, I presume, would continue?

A. I would say they would have to continue, and I would say if there was a strike that I would expect the Mayor's Commission to find some way for additional ambulance

service and additional cooperation. For example, during this period our fire fighters were brought to the fire stations by fire equipment, because we do have radio communication within a district. Our police officers were brought in police cars, because we do have the radios. It isn't the inconvenience that it would have been, nor are we gambling with the health and the welfare of mankind as they would have twenty years ago, without radio.

Q. I see, sir. So that in your ultimate judgment it would be a substantial inconvenience but not the kind of a thing where we are gambling with health welfare in a hospital sense, a public utility service sense, a prison sense; police stations would continue to operate, for example?

A. Police stations would continue to operate; hospitals would continue to operate; fire stations would continue to [fol. 169] operate, but at an added cost to the taxpayers because of a reorganization that would have to be made, and I believe we are in a position in a city of this size, Your Honor please, to cope with any problem, even though there be a shortage of tax dollars to adequately finance the normal program of municipal government.

Q. And I take it that that would include, for example, approximately normal functioning of public utilities like light, gas, telephone?

A. I had no requests from any of the utilities for any extra help from the municipality. Normally, when we are in a critical situation in Kansas City, Counselor, the municipality calls upon the utilities for help. It is usually our asking them instead of their asking us.

Q. And lastly, sir, I take it that one would expect that the industrial plants, barring inconvenience, would operate substantially normally?

A. I believe that is correct. I do not believe that it would keep them from operating; I believe they would have to work out some kind of a plan, which the municipality would help them implement, because I think that is the obligation of the municipality in the light of the ordinances of our city.

Mr. Dunau: Thank you, Mr. Mayor.

Redirect examination.

By Mr. Siddens:

Q. Mr. Mayor, from what you have said, though, it would [fol. 170] affect the public interest, health and welfare, wouldn't it, if this strike had continued?

A. Well, that is self-evident. I don't think there is any question on that score; you merely have to rearrange your program of life and liberty.

Q. Because of interruption of business, some people would have been laid off and they would have been without jobs, wouldn't they?

A. I am sure that is true in the retail area.

Q. And that would affect the public interest, wouldn't it?

A. It would certainly affect the banking interests of Kansas City.

Q. It would affect the employees involved, wouldn't it?

A. That's right.

Q. They would be without jobs and without earnings?

A. Yes, sir.

Mr. Siddens: That is all.

Mr. Dunau: Nothing further, sir.

The Court: Thank you, Mr. Mayor.

The Witness: Thank you, Your Honor.

(Witness excused.)

Noon recess.

[fol. 171]

AFTERNOON SESSION

FORREST W. GARRISON, was duly sworn:

Direct examination.

By Mr. Siddens:

Q. State your name, please.

A. Forrest W. Garrison.

Q. What is your business or occupation?

A. I'm a police officer, Kansas City, Missouri, Police Department.

Q. What rank?

A. Captain, sir.

Q. How long have you been a member of the Kansas City, Missouri, Police Department?

A. Twenty-two years, sir.

Q. What capacity or what particular area of police work do you now serve in?

A. I am presently assigned to the Traffic Safety Bureau.

Q. And have you in the past served other divisions or parts of the Department?

A. Yes, sir, I have.

Q. Did I ask you how many years?

A. Yes, sir.

Q. Now, Captain, I would like to direct your attention to November the 14th and 15th of this year, 1961, in which there was a strike of the transit workers, and a stoppage of the transit service in Kansas City. I would like for you to tell the Court what actions the Police Department took with respect to that work stoppage and stoppage of public transit.

A. All right, sir. May I refer to my notes? Does any [fol. 172] body have any objection?

Q. Yes, you may.

A. On these two dates that you speak of we had received advance notice of this and preparing for it we brought in all of our traffic officers, our motorcycle officers, and it was necessary that we work them approximately 12 hours on both days to accommodate the heavy flow of traffic which resulted as a result of the transit strike. Now, on the second day of the strike we experienced some adverse weather conditions and it was necessary that we use additional officers assigned to traffic to handle the flow of traffic on our, particularly on our 4:00 to 6:00 rush hours.

Q. Now, Captain, assume that this transit stoppage had extended for a longer period of time, for a couple of months for example, what plans had you made and what would be the results and what adverse effects did it have or would it have?

A. Well, had this strike continued for an indefinite period

of time, due to the fact that we are limited in our personnel in traffic with officers that are trained to handle traffic moving and traffic problems, it would have been necessary to draw on additional law enforcement officers not assigned to traffic, which would have impaired our over-all efficiency as a law enforcement agency in Kansas City.

Q. What would have been the effect upon the ability of [fol. 173] the men assigned to traffic to continue on working 12-hour shifts?

A. Well, we could work them 12 hours and we have worked them 12 hours a great many times here in Kansas City. The only thing it is fatiguing and after a period of time your efficiency goes down as a result of these assignments.

Q. That is, if this stoppage had continued for, say, a month or two months, would the efficiency of the department have been affected?

A. Yes, sir, your efficiency of your traffic officers assigned to this particular assignment would have been affected.

Q. And what would have been the effect on the general picture with respect to crime prevention and detection?

Mr. Dunau: If Your Honor please, I have an objection to this line, it is getting terribly speculative, what would happen if there were too much strike, and if police officers had to work 12 hours during a two months' strike and going down to crime detection seems to me—you might ask if he has an opinion on that.

By Mr. Siddens:

Q. Do you have an opinion on what the effect would be if there were a prolonged strike of a month or two months on the efficiency of the Department on the entire crime picture in Kansas City? Do you have an opinion, the question is?

A. Yes. My opinion—

[fol. 174] Q. Do you have an opinion?

A. Yes, sir.

Q. All right. What is that opinion?

Mr. Dunau: I reiterate the objection.
The Court: Sustained.

By Mr. Siddens:

Q. Well, can you state whether or not at—well, let's put it this way. If the strike had continued would or would not it have been necessary to draw upon other elements of the Police Department to aid in traffic control?

A. Yes, sir, it would have.

Q. When you draw upon that assistance from other parts of the Department, does that have an effect upon the crime rate in Kansas City?

A. It would have, sir, it would take away officers that normally their attention is directed towards crime prevention.

Mr. Siddens: You may examine.

Cross examination.

By Mr. Dunau:

Q. Captain, assuming that the strike had continued beyond two days, in your judgment is it likely that once the traffic pattern had become established so that people knew they were going to get into town by group riding, that you would not have needed the number of men later as you needed the first few days?

A. Well, sir, this is possible. However, with not a definite pattern to go on I don't think I could give you a [fol. 175] definite answer on this.

Q. In your judgment how long would it take, for example, before a pattern were established of car transportation to the downtown Kansas City area so that people were accustomed to the traffic problem and therefore you could reduce the number of officers that you had to have at the outset?

A. Well, sir, I think probably to look into this and to give you a definite answer we would have to anticipate our parking, our weather, our accident and our injury rate that would result as an increase of cars on the street, and having no guide line to go by it is kind of indefinite for me to say to you that this answer would be yes or no.

Q. But it is at least possible that you would not need the same number of officers if the strike continued as you needed during the first days of the strike?

A. Well, the only thing I can answer on that is we have figured through our traffic engineers and our Missouri Highway Commission that we have approximately two hundred or two hundred and fifty thousand cars use our streets a day in Kansas City and with increase which would run approximately 20 per cent I would say yes, we would have to have more officers present to control this traffic.

Q. Assuming you would have to have more officers present, would you have to have as many as time went on as you had at the outset?

[fol. 176] A. Oh, probably prolonged in experience it is possible that we would not, sir.

Q. Now, your answers I think were given on the assumption that the strike would last for a month and that if it lasted for a month or two then you might have some deleterious effect on the officers by virtue of working 12 hours and by virtue of having non-traffic officers in to the traffic. Now, if the strike lasted less than thirty days would you anticipate such a problem?

A. Well, we would have to use our officers and probably work them 12 hours a day so yes, we would have the fatigue problem there.

Q. Would you have a problem, do you anticipate, in terms of crime detection?

A. It is very likely, sir, because the administration or the head administration of the Department probably foreseeing this would take necessary steps to transfer adequate personnel to the Traffic Safety Bureau and as a result some of our other duties would probably have to go without anybody to work on them.

Q. That is on the assumption, of course, that experience would not demonstrate that you needed less personnel as time went on, on the traffic problem?

A. Well, at first, yes, we would definitely need this. Now, what our experience would show would have to remain to [fol. 177] be seen. I don't think I could give you any definite statement on that.

Q. Sir, what was the traffic experience during the two days of the strike, in your judgment?

A. Well, we had, of course, an increase in our traffic, and we had officers, two officers assigned to our main intersec-

tions and on our main thoroughfares and turning off our lights and directing through on manual controls they kept busy for the time that they were out there on our 7:00 to 9:00, 4:00 to 6:00, which is our traffic rush hours in Kansas City.

Q. Was the traffic running fairly well, though?

A. Yes, with the exception of on certain thoroughfares in Kansas City where we have an unusual heavy amount of traffic, they were backed up in some instances clear downtown from—may I cite an example, sir?

Q. Surely.

A. From 39th and Gillham we had them backed up down to 19th and Oak. Now, here, of course, Gillham is fed by about three or four streets and being one of the main thoroughfares to the southwest part of the city, we experienced difficulty on this both nights and both days.

Q. Was your difficulty on the second night as a result of the weather?

A. This had a great deal to do with it, sir, and, of course, [fol. 178] the vehicular accidents that we experienced.

Q. Would that have been true whether or not there had been a mass transportation strike?

A. Well, I don't think there would have been the odds there that you have to combat with the increased influx of the amount of traffic. Now, on any adverse weather conditions we do have a certain amount of vehicular accidents and we expect this.

Q. Sir, I want to read to you what is quoted in the Kansas City Times, Thursday, November 16th, on Page 2, Column 4. The news article quotes from Colonel William Canaday, Superintendent of Operations for the Police Department. The quotation is as follows: "We had a few problems as we usually do but they were straightened out quickly. We had traffic supervisors in the field all over the city watching the situation. They reported that everything seemed to be moving smoothly. The principal tie-ups occurred again briefly in the vicinity of 31st and Main Streets and at 31st and The Paseo but we had enough men assigned to those areas that we got things moving quickly. We kept extra traffic patrolmen on duty."

Would your judgment coincide with what was quoted by Colonel William Canaday?

A. Yes, sir, because he is my commanding officer.

Q. Independently of his commanding status?

[fol. 179] A. No, I mean this information either came from my office or from my lieutenants and the sergeant.

Q. Your judgment, then, would be in accord with this quotation?

A. That's right.

Mr. Dunau: I have nothing further.

Redirect examination.

By Mr. Siddens:

Q. Captain, you mentioned something about the weather.

A. Yes, sir.

Q. On, I believe, the second day of this strike there was a definite threat of a snowfall here, wasn't there?

A. Yes, sir, there was, very definite.

Q. What would have happened if we had a substantial snowfall or at any time while there was a work stoppage on the transit system, a substantial snowfall, and it is possible to have them this time of year, isn't it, November and December, January and February? If we had had a substantial snowfall and not transit, what would have happened as far as this town is concerned?

A. Well, our past experience I would say we would have experienced a paralysis of our traffic.

Mr. Siddens: That's all.

Mr. Dunau: I have no further questions. Thank you, Captain.

(Witness excused.)

Mr. Siddens: I believe that's all the evidence the State [fol. 180] has to offer at this time, Your Honor.

Plaintiff Rests

Mr. Dunau: We have nothing further, Your Honor.

Evidence Closed

(Colloquy outside the record.)

STATEMENT OF MR. DUNAU

Mr. Dunau: I do want to make a very brief statement on the record as to what we are preserving.

If Your Honor please, as of course Your Honor is aware, the Supreme Court of Missouri, in State of Missouri versus Local No. 8-6, Oil, Chemical and Atomic Workers International Union has passed for its purposes on the King-Thompson Act. It has ruled that the King-Thompson Act is not pre-empted by the Taft-Hartley Act. It has also ruled it is not vulnerable to attack on the 1st and 14th Amendment grounds. It would be pointless for us to argue to Your Honor in view of that decision that these questions are still open before you so on those questions I simply want to state we are preserving those points but do not argue them to Your Honor.

There are two additional points which in our view are not foreclosed by the decision of the Missouri Supreme Court and which we do address to Your Honor. The first is the question of the existence of a state of jeopardy to interest, health and safety within the meaning of the King-Thompson Act. In the decision of the Supreme Court of [fol. 181] Missouri in the Oil, Chemical and Atomic Workers case, the Supreme Court noted as follows: "It is quite clear that the patrons of Laclede Gas Company were not furnished with safe and adequate service after the strike began. The strike had been in progress for five days before the Governor exercised his emergency powers and it was four days later before the State filed suit. The evidence demonstrates conclusively that the public health, safety and interest was jeopardized and that the Governor had reasonable cause to take action."

In our view on the record in this case there was no reasonable cause to take action. All that the record establishes by way of jeopardy is that there would be a reduction in the retail sales in the downtown Missouri area. We hardly think that a reduction in the retail sales in the downtown Missouri area constitutes jeopardy to interest, health and safety within the meaning of the King-Thompson Act.

I think that the point we want to make was epitomized in the testimony of Mr. Austin who stated that the \$5.00

sale of a tie you do not make today you do not make. That may be true, I rather doubt it, but whether or not you make it, you do not jeopardize interest, health and safety by not making that sale. That is all that this evidence shows concrete with respect to an effect upon the community.

[fol. 182] I think the testimony of the Mayor was quite accurate. Substantial inconvenience no doubt would result but substantial inconvenience is not jeopardy to interest, health and safety. His Honor told us that the hospitals would continue to function, the police stations would continue to operate, public utilities would continue to function, industrial plants would continue to work. That is all that one can expect in a contemporary community if the right to strike is to be preserved at all. And the King-Thompson Act does not purport to destroy the right to strike, it purports to regulate public utilities when there is a strike. On this record there is no such showing.

Now, with respect to testimony that the company might be hurt as a result of a long strike, that may be entirely true, that is exactly what a strike is supposed to do, it is supposed to injure the company but injury to the company, if that would have materialized, is hardly jeopardy to interest, health or safety. If this statute is truly to be construed and be concerned with protecting the community in services it can expect rather than protecting the employers from the damage by strike.

We were also told the employees themselves would be hurt by going out on a strike, they would lose wages, for example. That's entirely true. That's what happens when employees go out on strike, but these people who over-[fol. 183]whelmingly voted to go on strike should be their own best judge as to whether they are willing to risk the loss of wages.

So our first point which we think is open still on the basis of the decision of the Missouri Supreme Court is that on this record there has been no showing of any jeopardy to interest, health and safety to an extent necessary to invoke the King-Thompson Act.

On the second point I should like to hand up to Your Honor a short memorandum. Independently of the existence of the Taft-Hartley Act we think that in this case the

State of Missouri is precluded from acting at all. I think I can make my point most clearly by looking to the temporary restraining order which was issued in this case. It says, "It is ordered that the defendant shall cease continuing, inciting, supporting and participating in any work stoppage, refusal to work and strike against the State of Missouri or Kansas City Transit, Inc."

The temporary and permanent injunctions which are sought request a cessation of a strike to do the things mentioned in Paragraph 1 of this prayer and Paragraph 1 of the prayer was a prayer for a temporary restraining order which would restrain a strike against the Kansas City Transit, Inc.

Kansas City Transit, Inc., operates in Kansas and Missouri. There is no constitutional power in the State of [fol. 184] Missouri to enjoin a strike against the Kansas City Transit, Inc., without the State of Missouri. The State of Missouri has no power to have its statutes operate extraterritorially.

Now, it will be no answer, it seems to us, to say, as I rather anticipate the State will say, that we are willing to include in any injunction which is issued by this Court a statement that it is not to extend beyond the borders of Missouri. We think that is no answer because on the basis of the integrated kind of operation which the Kansas City Transit, Inc., conducts it is impossible to stop a strike in Missouri and to continue it in Kansas. If Missouri has the power to stop the strike in Missouri, it has the power to stop it in Kansas, willy-nilly. This statute must operate extraterritorially and in our view there is no power in the State of Missouri as applied to this situation to operate where the effect of the statute would extend itself outside of the State of Missouri.

Our point very briefly was summarized in Cooley, Constitutional Limitations, "The legislative authority of every state must spend its force within the territorial limits of the state. The legislature of one state cannot make laws by which people outside the state must govern their actions."

This, it seems to us, is what the effect of the King-Thompson Act is as applied to this situation for we have [fol. 185] here an interstate business, not simply a busi-

ness whose operations affect interstate commerce, a business whose operations is in the pure sense interstate business. There is an interstate journey from Kansas to Missouri. You cannot practically conduct a Missouri operation without also conducting the Kansas operation. You cannot discontinue the Kansas operation without interrupting service in Missouri. We, therefore, think this statute operates extraterritorially in this situation and for that reason cannot be validly applied in this situation. Now, coequal ground, which is the same one here which I shall mention in just a minute, is that which I have said pertaining to extraterritorial operation, but independently of that, the commerce clause of the Constitution itself, it seems to us, prohibits state action in a situation where the action pertains directly to interstate journey. The power to regulate an interstate strike is the power to regulate interstate commerce and regardless of any Congressional action which may be taken, even if there is no Congressional action, a state has no power to regulate interstate commerce. It could not compel, it would have no power to compel a trip from Missouri into Kansas under the commerce clause, it could not compel that trip, it could not stop that trip. It is simply powerless to act in that situation.

If Missouri has the power to require service, Kansas [fol. 186] must at least have the power not to require it. If Missouri has the power to require it one way, Kansas must have the power to require it another way. But since we are dealing with a single interstate journey you cannot have two systems of law operating upon that one situation, and we quote from the Supreme Court in this situation, "The power of Congress to regulate interstate commerce"—whether or not it has actually been exercised—"is necessarily exclusive whenever the subjects on it are national in their character or"—and this is the significant part for our purposes—"or admit only of one uniform system, or plan of regulation."

There cannot be as to an interstate exercise like the Kansas City Transit Company two potential lawmaking authorities, Kansas and Missouri; that kind of a situation has to be regulated by Congress if it is to be regulated at all and that proposition stands whether or not Congress

has enacted a law on that subject. We have elaborated this point in our memorandum and I think that suffices for our purposes at this point, Your Honor.

The Court: Does the size of the Kansas operation as distinguished from the size of the Missouri operation have any bearing on your position?

Mr. Dunau: The Kansas operation is, from our point of view, a more compelling situation for the application of [fol. 187] our theory for the reason that the Kansas City Transit Company is an interstate business, it operates across state lines, and the Missouri case, the case involving the public utility in Missouri, is not an interstate business in the sense its business crosses state lines; it affects interstate commerce in the sense that it requires shipments across state lines for use in its own business. I think this is the reason why we are able to make the last point we have made here and which was not available in the first case decided by the Missouri Supreme Court. It is also the reason why we think clearly in this situation the Taft-Hartley Act has excluded any state action but that I think is something that the Missouri Supreme Court has resolved against us and is not open here.

Now, Your Honor has suggested however, which I should make very clear, under the jurisdictional standards of the National Labor Relations Board at the present time there is no question that the Kansas City Transit, Inc., is subject to the Taft-Hartley Act and the regulation of the National Labor Relations Board. With respect to public utility operations, of which the transit company is one, the National Labor Relations Board exerts jurisdiction if either the total volume of the utility's business is \$250,000.00 a year, in our case it was eight million, or if it is less than two hundred fifty thousand dollars, if it acquires [fol. 188] \$50,000.00 worth of goods from out of the state. Clearly the Kansas City Transit, Inc., acquires revenue in excess of \$50,000.00 from interstate journey so there is no question that this enterprise is subject to the jurisdiction of the National Labor Relations Board.

Mr. Siddens: Well, I think I for the most part tend to preserve any argument by written statement here but I am going to mention one thing that counsel has brought out. He mentions the fact that because the company may

be hurt there can be no public interest involved. Now, I don't think it takes explanation to point out that if the company is hurt to the point that the company fails, then the community ceases to have public transportation; that affects public interest. I think it is obvious. I don't believe that it is necessary to have direct evidence on that proposition.

I don't believe I am going to comment further on these other matters at the present time.

The Court: Anything more on the record?

Mr. Siddens: No.

Mr. Dunau: No.

The Court: I will take this matter under advisement and rule on it later this afternoon.

[fol. 189] Thereafter, on the same day, Tuesday, November 28, 1961, the following was entered of record:

Wherefore, it is ordered and adjudged by the Court that the temporary restraining order and order to show cause, heretofore entered herein, be and the same is hereby continued in effect until the further order of the Court.

[fol. 191]

IN THE CIRCUIT COURT OF JACKSON COUNTY

STIPULATION RE RECORD—Filed December 22, 1961

Come now State of Missouri, Plaintiff herein, and Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, et al., Defendants herein, by their attorneys, and stipulate and agree that the evidence heretofore introduced herein on November 27 and 28, 1961, may be considered by the Court on both the temporary and permanent injunction.

Filed Dec. 22, 1961

[fol. 192]

IN THE CIRCUIT COURT OF JACKSON COUNTY

DECREE—February 12, 1962

This cause having heretofore duly come on for hearing on November 27 and 28, 1961, on the plaintiff's temporary restraining order and order to show cause heretofore issued by the Court on November 15, 1961, at which time the defendants appeared by their attorneys, John J. Manning and Bernard Dunau, and presented evidence, and the plaintiff, State of Missouri, appeared by J. Gordon Siddens and Julian L. O'Malley, Assistant Attorneys General of the State of Missouri, and presented evidence, and the Court having taken the matter under advisement, and thereafter the parties, by their attorneys, stipulated and agreed "that the evidence heretofore introduced herein on November 27 and 28, 1961, may be considered by the Court on both the temporary and permanent injunction," and the Court having studied the briefs and arguments of counsel and being fully advised in the premises finds the issues in favor of the plaintiff and against the defendants.

Now, Therefore, It Is Ordered, Adjudged and Decreed that the defendants, and all of the persons to whom notice of this order of injunction may come, be and they are hereby permanently enjoined and restrained from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri.

[fol. 193] It Is Farther Ordered that defendants' motion to dismiss be denied and that the costs of this proceeding be adjudged against the defendants, for which let execution issue.

Dated this 12th day of February, 1962.

J. Donald Murphy, Judge.

IN THE CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL—Filed February 21, 1962

Notice is hereby given that Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, et al., Defendants above-named, hereby appeal to the Supreme Court of Missouri from the Decree and Permanent Injunction entered in this action on the 12th day of February, 1962.

Dated February 19, 1962.

Filed Feb. 21, 1962

[fol. 197]

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,
AT KANSAS CITY**

No. 639,507

STATE OF MISSOURI, Plaintiff,

vs.

**DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET,
ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF
AMERICA, et al., Defendants.**

Supplemental Transcript on Appeal

[fol. 198]

IN THE CIRCUIT COURT OF JACKSON COUNTY

ANSWER—Filed December 7, 1961

Now come defendants and for their answer to the petition for injunction state that:

1. Defendants admit the allegations of paragraphs 1, 2, and 3 of the petition.

2. Defendants admit the allegations of paragraph 4, except that they aver in addition that the employees of Kansas City Transit, Inc., and the members of Division 1287, Amaigamated Association of Street, Electric Railway and Motor Coach Employees of America are not limited in their work and residence to the state of Missouri but also live and work in the state of Kansas.

3. Defendants admit the allegations of paragraph 5, except as to the address which is 5701 Tracy, Kansas City, Missouri.

4. Defendants admit the allegations of paragraph 6, except that they deny that the service performed constitutes a "life essential," and except that they aver in addition that: (a) Kansas City Transit, Inc., operates under certificates of convenience and necessity issued by the United States Interstate Commerce Commission and the Kansas State Corporation Commission in addition to a certificate of convenience and necessity issued by the Public Service Commission of Missouri, (b) Kansas City Transit, Inc., also furnishes bus transportation exclusively in the [fol. 199] state of Kansas and interstate bus transportation between points in the states of Kansas and Missouri, (c) Kansas City Transit, Inc., operates about 81 round-trip miles in the state of Kansas, and (d) of the total round-trip route miles operated by Kansas City Transit, Inc., some routes operate exclusively within the state of Missouri, other routes operate exclusively in the state of Kansas, and others are interstate routes operating between the states of Missouri and Kansas.

5. The allegations of paragraph 7 are admitted, except that the persons employed are employed to furnish transportation service and to transact business in the state of Kansas in addition to the state of Missouri.

6. Answering the allegations of paragraph 8, the work and labor was done and performed in the state of Kansas in addition to the state of Missouri.

7. The allegations of paragraph 9 are admitted, except that the strike vote was taken on October 31 and Novem-

ber 1 and 2, 1961, and except that there was to be a cessation of work in the state of Kansas in addition to the state of Missouri.

8. The allegations of paragraphs 10, 11, and 12 are admitted, except that it is denied that the taking of possession of the property of the Kansas City Transit, Inc., was for use and operation by the state of Missouri or that it was in the public interest, and except that defendants [fol. 200] aver that the taking of possession was to insure continuation of operations in the state of Kansas in addition to the state of Missouri.

9. The allegations of paragraph 13 are denied, except that it is admitted that a strike took place on November 14 and 15, 1961, and that a dispute continues between Kansas City Transit, Inc., and Division 1287, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America concerning the terms of a collective bargaining agreement. It is specifically denied that any threatened or actual strike jeopardizes and/or threatens or jeopardized and/or threatened the public interest, health and welfare of the state of Missouri and of the inhabitants thereof.

10. Answering the allegations of paragraph 14, defendants aver that the employees have struck, and desire to strike, in furtherance of their collective bargaining demands made upon Kansas City Transit, Inc., and that defendants support and participate in such strike action. Defendants deny that any such strike action is a strike against or a refusal to work for the state of Missouri.

11. Answering the allegations of paragraph 15, Chapter 295, Revised Statutes of Missouri, 1949, is invalid and unconstitutional in that (a) it conflicts with and is preempted by the Labor Management Relations Act, 1947, [fol. 201] (b) it abridges federal rights conferred by the First, Thirteenth, and Fourteenth Amendments of the United States Constitution, and (c) as applied in this case, it operates extraterritorially, and therefore conflicts with the constitutional requirement that a State confine its authority within its own borders, and it directly regulates

interstate commerce, and therefore offends the Commerce Clause of the United States Constitution independently of implementing legislation by Congress. Further answering, the strike is not made unlawful by Chapter 295, Revised Statutes of Missouri, 1947, because there is no jeopardy to the public interest, health and welfare within the meaning of section 295.180 of the statute.

12. Defendants incorporate and make a part of this answer all the allegations and grounds stated by them in their motion to dismiss heretofore filed in this action.

Wherefore, having fully answered, defendants pray that the relief sought be denied in all respects and that the petition for injunction be dismissed, at plaintiff's costs.

Filed Dec. 7, 1961

[fol. 201a]

DEFENDANTS' EXHIBIT 1

PROCLAMATION

WHEREAS, after investigation, I find that there is a labor dispute existing between the Kansas City Transit, Inc., a public utility furnishing public passenger transportation service in the State of Missouri, and Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, recognized bargaining agent of the employees of the Kansas City Transit, Inc.; and

WHEREAS, after investigation, I find that as a result of such labor dispute there is a threatened strike on the part of the employees in Missouri of the Kansas City Transit, Inc., who are members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, which threatens the effective operation in Missouri of the Kansas City Transit, Inc.; and

WHEREAS, after investigation, in my opinion such threatened strike threatens to interrupt the operation in Missouri of the Kansas City Transit, Inc.; and

WHEREAS, after investigation, in my opinion the public interest, health and welfare are jeopardized;

NOW, THEREFORE, I, JOHN M. DALTON, Governor of Missouri, under and by virtue of the authority vested in me by the Constitution of Missouri and the statutes, including Chapter 295, and particularly Section 295.180, of the Revised Statutes of Missouri, 1959, do hereby proclaim as follows:

(1) That the continued operation of the Kansas City Transit, Inc., a public utility, is threatened as the result of a labor dispute.

[fol. 201b] (2) That interruption of the operation of the Kansas City Transit, Inc., a public utility, is threatened as the result of a threatened strike on the part of employees of the Kansas City Transit, Inc., who are members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America.

(3) That the public interest, health and welfare are jeopardized as a result of the threatened interruption of the operation of such public utility.

(4) That the exercise of the authority vested in me by Chapter 295, and particularly Section 295.180, of the Revised Statutes of Missouri, 1959, is necessary to insure the operation in Missouri of the Kansas City Transit, Inc., a public utility.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Missouri to be hereto affixed on this 13th day of November, 1961.

/s/ JOHN M. DALTON
Governor

Attest:

/s/ WARREN E. HEARNES
Secretary of State

/s/ AUSTIN HILL
Chief Clerk

[SEAL]

[fol. 201c]

DEFENDANTS' EXHIBIT 2**EXECUTIVE ORDER NO. 1****TO THE SECRETARY OF STATE:**

WHEREAS, there is a labor dispute existing between the Kansas City Transit, Inc., a public utility furnishing public passenger transportation service in the State of Missouri, and Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, recognized bargaining agent of certain of the employees of the Kansas City Transit, Inc.; and

WHEREAS, as a result of such labor dispute there is a threatened strike on the part of the employees in Missouri of the Kansas City Transit, Inc., who are members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, which threatens the effective operation in Missouri of the Kansas City Transit, Inc., a public utility; and

WHEREAS, in my opinion such threatened strike threatens to interrupt the operation in Missouri of the Kansas City Transit, Inc.; and

WHEREAS, in my opinion the public interest, health and welfare are jeopardized; and

WHEREAS, after investigation, I, JOHN M. DALTON, Governor of Missouri, by Executive Proclamation dated the 13th day of November, 1961, proclaimed:

(1) That the continued operation of the Kansas City Transit, Inc., a public utility, is threatened as the result of a labor dispute.

(2) That interruption of the operation of the Kansas City Transit, Inc., a public utility, is threatened as the result of a threatened strike on the part of employees of the Kansas City Transit, Inc., who are members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America.

[fol. 201d] (3) That the public interest, health and welfare are jeopardized as the result of the threatened interruption of the operation of such public utility.

(4) That the exercise of the authority vested in me by Chapter 295, and particularly Section 295.180, of the Revised Statutes of Missouri, 1959, is necessary to insure the operation in Missouri of the Kansas City Transit, Inc., a public utility.

NOW, THEREFORE, I, JOHN M. DALTON, Governor of the State of Missouri, by virtue of the authority vested in me by Chapter 295, and particularly Section 295.180, of the Revised Statutes of Missouri, 1959, do hereby order as follows:

I hereby take possession of the plants, equipment, and all facilities of the Kansas City Transit, Inc., located in the State of Missouri, for the use and operation by the State of Missouri in the public interest, effective at 11:59 o'clock, P.M., Central Standard Time, Monday, November, 13, 1961.

/s/ JOHN M. DALTON
Governor

Attest:

/s/ WARREN F. HEARNES
Secretary of State

/s/ AUSTIN HILL
Chief Clerk

[SEAL]

[fol. 201e]

DEFENDANTS' EXHIBIT 3

EXECUTIVE ORDER NO. 2

TO THE SECRETARY OF STATE:

WHEREAS, I, JOHN M. DALTON, Governor of the State of Missouri, after investigation, by Executive Proclamation dated the 13th day of November, 1961, proclaimed:

(1) That the continued operation of the Kansas City Transit, Inc., a public utility, is threatened as the result of a labor dispute.

(2) That interruption of the operation of the Kansas City Transit, Inc., a public utility, is threatened as the result of a threatened strike on the part of employees of the Kansas City Transit, Inc., who are members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America.

(3) That the public interest, health and welfare are jeopardized as the result of the threatened interruption of the operation of such public utility.

(4) That the exercise of the authority vested in me by Chapter 295, and particularly Section 295.180, of the Revised Statutes of Missouri, 1959, is necessary to insure the operation in Missouri of the Kansas City Transit, Inc., a public utility.

WHEREAS, by Executive Order No. 1, dated November 13th, 1961, I have taken possession of the plants, equipment and all facilities of the Kansas City Transit, Inc., located in the State of Missouri, for the use and operation by the State of Missouri in the public interest;

NOW, THEREFORE, I, JOHN M. DALTON, Governor of the State of Missouri, by virtue of the authority vested in me by Section 295.180 of the Revised Statutes of Missouri, 1959, do hereby order as follows:

[fol. 201f] (1) That Daniel C. Rogers, Chairman of the Missouri State Board of Mediation, acting as my agent, is

hereby authorized and directed to take possession of the plants, equipment and all facilities of the Kansas City Transit, Inc., in the State of Missouri or such parts of each of said plants, equipment and facilities as may be necessary for the purpose of carrying out the provisions of this Order, and to effect my Proclamation and Executive Order No. 1 declaring the public interest, health and welfare jeopardized, in order to insure that the said utility above mentioned is effectively operated in the interest of the people of this State to the end that they may have the benefit of necessary and essential public utility services.

(2) Said Daniel C. Rogers shall exercise the aforesaid authority as my agent forthwith, and he shall continue to exercise the aforesaid authority as my agent and unless otherwise directed by me.

(3) All rules and regulations of the aforesaid utility governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of Missouri.

(4) This Order shall take effect at 11:59 P.M., Central Standard Time, November 13, 1961.

Done this 13th day of November, 1961.

/s/ JOHN M. DALTON
Governor

Attest:

/s/ WARREN E. HEARNES
Secretary of State

/s/ AUSTIN HILL
Chief Clerk

[SEAL]

[fol. 201g]

DEPENDANTS' EXHIBIT 4

SCHEDULE 1

Supplemental Decision and Certification of Representatives, with Appendix "A" thereto, of National Labor Relations Board, dated February 19, 1943, Case No. R-4705, and Stipulation between the parties to said Case, dated March 31-April 6, 1943.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. R-4705

In the Matter of

KANSAS CITY PUBLIC SERVICE COMPANY

and

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, affiliated with the American Federation of Labor.

Supplemental Decision

and

Certification of Representatives

On January 25, 1943, the National Labor Relations Board issued a Decision and Direction of Elections in the above-entitled proceeding.¹ Pursuant to the Direction of Elections, elections by secret ballot were conducted on February 8, 1943, under the direction and supervision of the Regional Director for the Seventeenth Region (Kansas City, Missouri). On February 8, 1943, the Regional Director, acting pursuant to Article III, Section 10, of National La-

¹ 47 N.L.R.B., No. 1

bor Relations Board Rules and Regulations—Series 2, as amended, issued and duly served upon the parties an Election Report. No objections to the conduct of the ballots or to the Election Report have been filed by any of the parties.

As to the balloting and the results thereof the Regional Director reported as follows:

(1) TRANSPORTATION DEPARTMENT

Total on eligibility list	1,087
Total ballots cast	1,064
Total ballots challenged	32
Total blank ballots	1
Total void ballots	0
Total valid votes counted	1,031
Votes cast for Amalgamated Association of Street, Electric Railway & Motor Coach Em- ployees of America, Division 1287 (AFL)	648
Votes cast for Brotherhood of Railroad Train- men	379
Votes cast for neither	4

[fol. 201h]

(2) OTHER EMPLOYEES

Total on eligibility list	387
Total ballots cast	340
Total ballots challenged	16
Total blank ballots	0
Total void ballots	0
Total valid votes counted	324
Votes cast for Amalgamated Association of Street, Electric Railway & Motor Coach Em- ployees of America, Division 1287, affiliated with the American Federation of Labor	282
Votes cast against Amalgamated Association of Street, Electric Railway & Motor Coach Em- ployees of America, Division 1287, affiliated with the American Federation of Labor	42

In the Decision and Direction of Elections referred to above the Board made no final determination as to the appropriate unit. The Board stated:

If the employees in the Transportation Department select a bargaining representative other than the representative selected by the remaining employees, they will constitute a separate and distinct appropriate unit. If they choose the same representative as the remaining employees, they will be merged into a single unit with such employees.

Upon the basis of the entire record in the case, the Board makes the following:

SUPPLEMENTAL FINDING OF FACT

We find that all employees of the Company, including those in the Transportation Department, but excluding employees in the classifications listed in Appendix "A" attached hereto, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

Certification of Representatives

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, pursuant to Article III, Sections 9 and 10, of National Labor Relations Board Rules and Regulations—Series 2, as amended, IT IS HEREBY CERTIFIED that Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 1287, affiliated with the American Federation of Labor, has been designated and selected by a majority of all employees of Kansas City Public Service Company, Kansas City, Missouri, including those in the Transportation Department, but excluding employees in classifications listed in Appendix "A" attached hereto, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 1287, affiliated with the American Federation of Labor, is the exclusive representative of all such employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Washington, D.C., this 19 day of February,
1943.

(s) Wm. M. LEISERSON
Member

(s) GERARD D. REILLY
Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

[fol. 201i]

DEFENDANTS' EXHIBIT 5

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. R-4705

In the Matter of

KANSAS CITY PUBLIC SERVICE COMPANY

and

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY &
MOTOR COACH EMPLOYEES OF AMERICA, affiliated with the
American Federation of Labor.

Stipulation

It is hereby stipulated by and between Kansas City Public Service Company and Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, affiliated with the American Federation of Labor, and Joseph E. Watson, Regional Director, Seventeenth Region, acting as agent for the National Labor Relations Board

I.

That employees of Kansas City Public Service Company, whose duty it is to assist the operators of street cars and

buses by issuing transfers, taking tokens and otherwise aiding in loading buses and street cars are not "collectors" within the meaning of the Decision and Direction of Elections and Certification of the National Labor Relations Board.

II.

That "collectors" in Appendix A of the Supplemental Decision and Certification of the National Labor Relations Board issued in the above-entitled case is the same as "collectors" as described in footnote 4 of the Decision and Direction of Elections of the National Labor Relations Board issued in the above-entitled case, and that in both instances the word "collectors" refers to employees who are also known as "fareboxmen."

III.

It is further stipulated that the employees described in paragraph 1 hereof participated in the election held in the above-entitled case as employees within the appropriate unit, and that such employees are within the appropriate unit as found by the National Labor Relations Board, in its Decision and Direction of Elections and Supplemental Decision and Certification of Representatives.

(s) JOSEPH E. WATSON
Regional Director
Seventeenth Region
National Labor Relations Board

Dated at Kansas City, Missouri April 6, 1943

KANSAS CITY PUBLIC SERVICE COMPANY
By (s) POWELL C. GRONER

Dated at Kansas City, Missouri March 31, 1943

AMALGAMATED ASSOCIATION OF STREET,
ELECTRIC RAILWAY & MOTOR COACH
EMPLOYEES OF AMERICA, affiliated with
the American Federation of Labor
By (s) J. B. ALLTOP

Dated at Kansas City, Missouri April 6, 1943

[fol. 201j]

DEFENDANTS' EXHIBIT 6

(Western Union Telegram Form)

DUPLICATE OF TELEPHONED TELEGRAM

OCT 31 PM 4 18

404P CST OCT 31 61 KB402

SA339 S JCA991 PD JEFFERSON CITY MO 31 331P CST
 LOREN HARGUS, PRESIDENT DIV 1287 AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA

913 TRACY AVE KSC

IN VIEW OF THE REPORTED IMPASSE IN YOUR LABOR NEGOTIATIONS, I URGE THAT YOU ACCEPT THE SERVICES OF THE FULL MEMBERSHIP OF THE STATE BOARD OF MEDIATION FORTHWITH TO HEAR THE MOST IMPORTANT ISSUES AND MAKE RECOMMENDATIONS FOR SETTLEMENT

JOHN M DALTON GOVERNOR.

[fol. 201k]

DEFENDANTS' EXHIBIT 7

(Western Union Telegram Form)

919P EST NOV 1 61 KB486

SSA301 K LLD592 NL PD KANSAS CITY MO 1

LOREN HARGUS

913 TRACY KSC

IN RESPONSE TO YOUR TELEGRAM DATED OCTOBER 31ST PLEASE BE ADVISED THAT THIS LABOR ORGANIZATION WILL ACCEPT THE MEDIATION EFFORTS OF THE FULL STATE BOARD OF MEDIATION OR OF A SINGLE REPRESENTATIVE OF THAT BOARD PROVIDED THAT SUCH EFFORTS DO NOT INCLUDE HEARINGS WHICH RESULT IN RECOMMENDATIONS

**AMALGAMATED ASSOCIATION OF STREET
ELECTRIC RAILWAY AND MOTOR EMPLOYEES OF
AMERICA LOREN HARGUS PRESIDENT DIV 1287**

31 1287.

[fol. 2011]

DEFENDANTS' EXHIBIT 8

November 8, 1961

**TO ALL MEMBERS OF THE MISSOURI STATE BOARD
OF MEDIATION:**

This morning, at the meeting of this Board held at the Hotel President in Kansas City, Missouri, Mr. Daniel C. Rogers, Chairman of the Board, advised the representatives of the Kansas City Transit, Inc., and of Local 1287 Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America that the Board was here to attempt to settle the issues between the parties and suggested that the Union, as the moving party, should first present its position with respect to the wage issue and then, if it desired, could make any statements it saw fit concerning any other issues. Mr. Rogers stated that the hearing would be held along the lines set out in Governor Dalton's telegram. He then stated that the Board was not conducting a public hearing but that, however, if members of the public insisted upon attending the meeting the Board was not certain of their authority to prevent public attendance. Mr. Rogers then went on to state that the Board, after hearing the evidence of both of the parties, would make up its mind as to whether it would confine itself to purely mediatory efforts or whether it would make recommendations.

The following are direct quotations of statements made by Mr. Rogers at the meeting this morning:

1. "The Board reserves the right to make recommendations."
2. "The Board will not bind itself to be confined to mediations only."

3. "The Board will not bind itself to not make recommendations."

Representatives of the Union then stated to the Board members that the Union welcomed the efforts of any governmental agency and that they were present at the meeting for the purpose of accepting the Board's efforts to mediate only.

You are hereby advised that this Union is still agreeable to participating in any efforts of this Board to mediate this dispute so long as such efforts are of a mediatory nature. The Union will not, however, participate in any hearing of a public nature nor will it participate further in any proceedings with this Board unless the Board clearly states in advance, in writing, that it will not make recommendations, public or otherwise, and that it will confine its efforts to mediation only.

LOCAL 1287 AMALGAMATED ASSOCIATION
OF STREET, ELECTRIC RAILWAY AND
MOTOR COACH EMPLOYEES OF AMERICA

By _____
Loren Hargus, President

[fol. 201m]

DEFENDANTS' EXHIBIT 9

MISSOURI STATE BOARD OF MEDIATION

Kansas City, Mo.
November 8, 1961

Mr. Loren Hargus, President
Local 1287 Amalgamated Association of Street,
Electric Railway and Motor Coach Employees
of America, Kansas City, Missouri

Dear Mr. Hargus:

In response to your letter of November 8, 1961, personally handed to the members of the State Board of

Mediation of Missouri, convened at the Hotel President to hear a labor dispute between your union and the Kansas City Transit, Incorporated, you are hereby advised that subsection 2 of Section 295.080 of Revised Statutes of Missouri, provides that the State Board of Mediation—

“ . . . shall take whatever steps it deems expedient to bring about a settlement of the dispute including assisting in negotiating and drafting a settlement agreement.”

The members of the Board are in unanimous agreement that the powers vested in the Board, as aforesaid, and as intended from the remaining provisions of the King-Thompson Act, justify the Board in its purpose to hear the issues in dispute and to exercise its mediation authority, including recommendations for settlement.

The Board of Mediation therefore requests the parties now before it to remain in session and to continue in mediation conferences as provided in subsection 3 of Section 295.080, Revised Statutes of Missouri.

Very truly yours,

MISSOURI STATE BOARD OF MEDIATION

By /s/ DANIEL C. ROGERS

Chairman

Room 132 State Capitol Bldg.
Jefferson City, Missouri

[fol. 201n]

DEFENDANTS' EXHIBIT 10

(Western Union Telegram Form)

1209A CST NOV 14 61 KB015

SA007 S JCA308 PD JEFFERSON CITY MO 13 1151P CST
LOREN HARGUS, PRESIDENT

DIVN 1287 AMALGAMATED ASSN OF STREET
ELECTRIC RY AND MOTOR COACH EMPLOYEES
OF AMERICA 913 TRACY AVE KSC

BY VIRTUE OF THE AUTHORITY VESTED IN ME
BY CHAPTER 295 RSMO, I HAVE TAKEN POSSES-
SION OF THE PLANTS AND FACILITIES IN THE
STATE OF MISSOURI OF KANSAS CITY TRANSIT,
INC., FOR OPERATION BY THE STATE OF MIS-
SOURI IN THE PUBLIC INTEREST, EFFECTIVE
11:59 PM, NOVEMBER 13, 1961. I HAVE DESIG-
NATED MR. DANIEL C. ROGERS MY AGENT FOR
THE OPERATION OF THE FACILITIES. KANSAS
CITY TRANSIT INC IS REQUESTED TO KEEP ITS
FACILITIES AVAILABLE FOR SUCH OPERATION.
EMPLOYEES OF KANSAS CITY TRANSIT INC WHO
ARE MEMBERS OF DIVISION 1287, AMALGAMATED
ASSN OF STREET, ELECTRIC RY AND MOTOR
COACH EMPLOYEES OF AMERICA ARE HEREBY
NOTIFIED TO CONTINUE TO PERFORM THEIR DU-
TIES OF EMPLOYMENT UNDER SUCH OPERATION

[fol. 201o] JOHN M DALTON GOVERNOR

295 RSMO 11XXXX 295 RSMO 11:59 PM 13 1961 1287.

148

[fol. 201p]

DEFENDANTS' EXHIBIT 11

DK 103 PD 3 EX NOV 17 1240P CST

DANIEL C ROGERS AGENT FOR GOVERNOR

JOHN M DALTON

ROOM 325 PRESIDENT HOTEL

KSC

THE SEIZURE PAPERS EFFECTUATING STATE SEIZURE OF THE PROPERTY OF THE KANSAS CITY TRANSIT INC EFFECTIVE AS 1159 PM ON NOVEMBER 13 1961 IS NOT CLEAR TO THE OFFICERS OF LOCAL DIVISION NUMBER 1287 WITH RESPECT TO WHOM WE SHOULD DEAL IN CASES OF PROCESSING GRIEVANCES AND DISPUTED ISSUES ARISING OUT OF THE OPERATION OF THE KANSAS CITY TRANSIT INC PROPERTY AND FACILITIES WHILE UNDER SUCH SEIZURE I WOULD APPRECIATE VERY MUCH A STATEMENT IN WRITTING FROM YOU, AS THE GOVERNORS AGENT, ADVISING ME AS TO WHOM WE MAY PROPERLY CONFER IN THE PROCESSING OF SUCH GRIEVANCES AND DISPUTED ISSUES

LOREN HARGUS

PRESIDENT LOCAL DIV 1287

GRA 1 0928

AMALGAMATED ASSOC OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA

SEND CONFIRMATION TO
LOREN HARGUS

913 TRACY

KSC

CFN FURNISHED

[fol. 201q]

DEFENDANTS' EXHIBIT 12

(Western Union Telegram Form)

457P CST NOV 17 61 KB509

SSD348 K DWA069 NL PD DW KANSAS CITY MO 17

LOREN HARGUS, PRESIDENT

LOCAL 1288 AMALGAMATED ASSOCIATION

913 TRACY KSC

AS DISCUSSED WITH YOU IN YOUR TELEPHONE INQUIRY THIS MORNING GRIEVANCE CASES AND OTHER RELATIONSHIPS BETWEEN YOUR UNION AND KANSAS CITY TRANSIT, INC, SHOULD BE HANDLED AND PROCESSED IN SAME MANNER AS HAD BEEN NORMAL AND CUSTOMARY PRIOR TO ISSUANCE OF EXECUTIVE ORDERS BY THE GOVERNOR. SEE SECTION NUMBERED (3) OF EXECUTIVE ORDER NO 2. I INFORMED MR D B EGRE AS ABOVE BY TELEPHONE IMMEDIATELY AFTER YOUR INQUIRY AND I AM SENDING HIM A COPY OF THIS REPLY TO YOUR TELEGRAM

DANIEL C ROGERS CHAIRMAN MISSOURI STATE BOARD OF MEDIATIONS.

[fol. 206]

[File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

EN BANC

[Title omitted]

**ALTERNATIVE MOTION (1) TO SUMMARILY AFFIRM THE JUDGMENT, OR (2) TO EXPEDITE THE APPEAL BY SUBMITTING THE APPEAL ON BRIEFS WITHOUT ORAL ARGUMENT—
Filed March 15, 1962**

Appellants alternatively move the Court either (1) to summarily affirm the judgment on the authority of this Court's decision in *Missouri v. Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W.2d 309, vacated as moot, 361 U.S. 363, or (2) to expedite the appeal by submitting it on briefs without oral argument, briefs to be simultaneously served within thirty days from the date of the order granting the motion to expedite the appeal.

In support thereof appellants show that:

1. This appeal is from a decree of the Circuit Court of Jackson County entered on February 12, 1962, adjudging that:

... the defendants, and all of the persons to whom notice of this order of injunction may come, be and they are hereby permanently enjoined and restrained from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri.

The decree was entered as a result of proceedings invoking the King-Thompson Act (Rev. Stat. Mo. 1949) in the following circumstances briefly stated: Kansas City Transit, Inc., is an interstate enterprise engaged in the business of transporting passengers by bus in and between [fol. 207] the States of Kansas and Missouri; its operations affect interstate commerce within the meaning of sections 2(6) and (7), Title I, Labor Management Relations Act, 1947 (61 Stat. 316, 29 U.S.C., Sec. 141) (Tr. 20-29, 31-32,

33-36; *Kansas City Public Service Co.*, 47 NLRB 1, 2). Appellant union is the exclusive bargaining representative, certified as such by the National Labor Relations Board, of a unit of employees of the transit company composed primarily of bus drivers and maintenance personnel (Tr. 28, 30, 31, 45, 98-99, def. ex. 4). Negotiations between the company and the union, looking toward accord upon new contract terms to succeed the collective bargaining agreement due to expire on October 31, 1961, reached an impasse on October 13, 1961 (Tr. 100-102, def. ex. 5, p. 3). Thereafter, on October 31 and November 1 and 2, 1961, the union conducted a strike vote by secret ballot among the employees resulting in a 681 to 74 vote in favor of a strike (Tr. 106).

Section 295.180 of the King-Thompson Act provides that the Governor of Missouri is authorized "to take immediate possession" of a public utility "after his investigation and proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of . . . a threatened or actual strike, . . . and that the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility. . . ." In accordance with this provision, on November 13, 1961, the Governor issued a proclamation that the threatened strike against the company required him to exercise his authority to take possession of it in order to assure its operation (Def. ex. 1). On the same date, the Governor issued Executive Order No. 1 stating that "I hereby take possession of the plants, equipment, and all facilities of the Kansas City Transit, Inc., located in the State of Missouri, for the use and operation by the State of Missouri in the public interest, effective at 11:59 o'clock, P.M., Central Standard Time, Monday, November 13, 1961" (def. ex. 2). Still the same day, the Governor issued Executive Order No. 2, designating the Chairman of the Missouri State Board of Mediation as his [fol. 208] agent to take possession (def. ex. 3). Section 295.200.1 of the King-Thompson Act makes "unlawful," after a utility has been "taken over," "any strike or concerted refusal to work . . . as a means of enforcing any demands against the utility. . . ."

At midnight November 13, 1961, the Union struck the Company and picketed its various premises (Tr. 106-107). The strike and picketing were discontinued in the evening of November 15, 1961, as a result of the issuance of a temporary restraining order by the Circuit Court of Jackson County, enjoining "any work stoppage, refusal to work and strike against the State of Missouri or Kansas City Transit, Inc." (Tr. 10, 107). During its continuance the strike and picketing were peaceful (Tr. 107). After hearing, the Circuit Court issued the final decree from which this appeal is taken.

2. Before the Circuit Court appellants resisted the action upon the following grounds:

(a) The King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947.

(b) The King-Thompson Act abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution.

(c) As applied in this case, the King-Thompson Act (i) operates extraterritorially, and therefore conflicts with the constitutional requirement that a State confine its authority within its own borders; and (ii) directly regulates interstate commerce, and therefore offends the Commerce Clause of the United States Constitution independently of implementing legislation by Congress.

(d) The actual or threatened strike against Kansas City Transit, Inc., did not jeopardize the "public interest, health and welfare" within the meaning of the King-Thompson Act.

Grounds (a) and (b) have been heretofore decided adversely to appellants' position by this Court in *Missouri v. Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W.2d 309, vacated as moot, 361 U.S. 363. Grounds (c) and (d) are undetermined by and open under the latter [fol. 209] decision. However, on the procedure to expedite the appeal sought by this motion, appellants would drop grounds (c) and (d) and confine their appeal to grounds (a) and (b). The expedited appeal would thus be limited

to urging this Court to overrule its prior decision and would not urge reversal on grounds not comprehended by and considered in the prior decision. In short, appellants on this procedure withdraw grounds (c) and (d), and urge only grounds (a) and (b).

Appellants will request respondent to agree to submit the appeal on briefs without oral argument.

3. In lieu of an expedited appeal confined to urging the overruling of the prior decision, there is the alternative of summary affirmance of the judgment on the authority of the prior decision. Unless this Court were disposed to reconsider the merits of its prior decision, briefs urging adherence to it or reversal of it would appear to be pointless, and forthright judicial administration would be served by prompt affirmance of the judgment in reliance upon the prior controlling decision. Appellants entertain no doubt that affirmance of the judgment in this fashion would be no impediment to review by the Supreme Court of the United States. Summary affirmance on the authority of a prior decision was the course followed in *Peters v. Hobby*, 349 U.S. 331, and the judgment thus summarily affirmed was thereafter reviewed by the Supreme Court of the United States on the merits. The brief of the Attorney General of the United States on behalf of the respondent in *Peters v. Hobby* described the procedure followed (Br. for Res., *Peters v. Hobby*, 349 U.S. 331, October Term, 1954, No. 376, p. 20):

On appeal, the cause was presented to the court below on petitioner's motion to enter judgment on the merits without formal briefs or argument. The parties agreed that this action presented the same issues decided by that court in *Bailey v. Richardson*, 182 F.2d 46, affirmed by an equally divided court, 341 U.S. 918. Feeling "obliged to follow the ruling in that case in the determination of the present case," the court below granted petitioner's motion for the entry of judgment without formal briefs or argument and affirmed the judgment entered for respondents by the district court (R. 28).

[fol. 210] 4. The present appeal is of course not moot. The decree is presently outstanding and in operative effect,

and will certainly remain so as long as the Governor retains possession of the property of Kansas City Transit, Inc., pursuant to the King-Thompson Act. Expedition is essential, however, in order to safeguard against the possibility of mootness. This Court's prior decision validating the King-Thompson Act was not considered on the merits by the Supreme Court of the United States because of mootness. 361 U.S. 363. The validity of the King-Thompson Act can be finally and authoritatively determined only by the Supreme Court of the United States, and it would serve the welfare of all to facilitate and obtain dispositive determination of the question.

5. This appeal is to be determined by this Court en banc in accordance with Article 5, Section 9, of the Missouri Constitution in that "a federal question is involved. . . ." 2 V.A.M.S., Art. 5, Sec. 9, p. 212 (1945).

Wherefore, the motion should be granted either (1) summarily affirming the judgment on the authority of this Court's prior decision in *Missouri v. Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W.2d 309, vacated as moot, 361 U.S. 363, or (2) expediting the appeal by submitting it on briefs without oral argument, briefs to be simultaneously served within thirty days from the date of the order granting the motion to expedite the appeal.

Respectfully submitted,

John Manning, 3333 Warwick Boulevard, Kansas City, Missouri; Bernard Cushman, 5025 Wisconsin Avenue, N.W., Washington, D.C.; Bernard Dunau, 912 Dupont Circle Building, N.W., Washington 6, D.C., Attorneys for Appellants.

March 1962

[fol. 212]

[File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

EX BANC

[Title omitted]

SUGGESTIONS OF RESPONDENT, STATE OF MISSOURI, WITH REFERENCE TO APPELLANTS' ALTERNATIVE MOTION—Filed March 20, 1962

Respondent, State of Missouri, herewith submits to the Court its suggestions in connection with appellants' Alternative Motion (1) to Summarily Affirm the Judgment, or (2) to Expedite the Appeal, and in connection therewith respondent shows and states to the Court as follows:

1. With reference to appellants' Motion to Summarily Affirm the Judgment, the respondent objects to and opposes that motion. The case at bar is an appeal by the defendants from a permanent injunction issued by the trial chancellor. This Court has many times said that in suits in equity the case is before this Court for trial de novo and this Court has the duty to weigh the evidence and reach its own conclusions on the facts and to apply the facts it finds to the law. *Cleary v. Cleary*, Mo., 273 SW2d 340, 346; *Dreckshage v. Dreckshage*, 352 Mo. 78, 176 SW2d 7, 14; *Lastofka v. Lastofka*, 339 Mo. 770, 99 SW2d 46, 54; *Kizior v. City of [fol. 213] St. Joseph* Mo., 329 SW2d 605, 608; *Ragan v. Schreffler*, Mo., 306 SW2d 494, 496; and *Wagner v. Hicken*, Mo., 232 SW2d 531, 534.

We are unable to find authority either in the cases or in the Court's rules authorizing the Court to summarily affirm the judgment appealed from by the appellants. In the case at bar, the facts are completely different than those decided by the Court in *State of Missouri v. Local 8-6*, Mo., 317 SW2d 309. The issues tried in the trial court and the theory of presentation in the trial court are not identical with the theory now presented by appellants in their Motion to Affirm. This Court having the duty to review the trial

court should do so knowingly and with full understanding and knowledge of the facts and the applicable law.

The basis of appellant's Motion to Affirm the Judgment in this case is to secure a decision from this Court to provide a platform to apply for certiorari or appeal to the Supreme Court of the United States. This procedure compels this Court to pass upon the case as an abstract legal proposition without reference to the facts and the applicable law. This procedure denies this Court opportunity for considered judgment. This Court will give full consideration to appellants' meritorious arguments and contentions that would warrant any change in its view of the law. But to do this, the Court must consider those arguments and contentions. It would be manifestly unfair to seek to convict this Court of error without the Court having considered appellants' brief and arguments.

2. With reference to appellants' Motion to Expedite the Appeal, respondent has agreed with appellants to waive oral argument and submit the case to the Court on briefs [fol. 214] without oral argument in order to expedite the presentation and decision of this case. But, however, respondent objects to appellants' request that briefs be simultaneously served. Respondent is without definite knowledge as to exactly the manner and method which appellants will present their arguments and contentions, and thus to require the simultaneous filing of briefs by appellants and respondent would require respondent to set up arguments which it assumes the appellants will make and then proceed to direct its argument against those assumed appellants' arguments. This would not only be awkward but would tend toward confusion, lack of clarity, perhaps omission of arguments, and would surely not tend to aid in expediting consideration of this appeal. The regular and orderly course of procedure for filing briefs is indicated by Supreme Court Rule 83.06, which requires appellants' brief to be filed; then respondent's brief to be filed, and thereafter appellants' reply brief. While respondent is willing to cooperate in the expeditious submission of this matter within reason, yet respondent believes that undue haste and abnormal short-cut procedures would not

be in the public interest and would not insure reasonable and adequate protection of the public interest.

Respectfully submitted,

Thomas F. Eagleton, Attorney General; J. Gordon Siddens, Assistant Attorney General, Attorneys for Respondent.

Copy of the within and foregoing Suggestions of Respondent, State of Missouri, with Reference to Appellants' Alternative Motion mailed this 20 day of March, 1962, to John Manning, 3333 Warwick Boulevard, Kansas City, Missouri, Bernard Cushman, 5025 Wisconsin Avenue, NW, Washington, D.C., and Bernard Dunan, 912 Dupont Circle Building 6, NW, Washington 6, D.C., Attorneys for Appellants.

Gordon Siddens

[fol. 226]

IN THE SUPREME COURT OF MISSOURI.

[Title omitted]

ORDER ON ALTERNATIVE MOTIONS—April 9, 1962

Now at this day the court having seen and considered appellants' Alternative Motion (1) to summarily affirm the judgment or (2) to expedite the appeal by submitting the appeal without oral argument and suggestions filed by the Attorney General, doth order that said motion to affirm be, and the same is hereby denied, and the motion to submit appeal on briefs without oral argument is by the consent of counsel sustained. It is further considered and ordered by the court that the motions of Gage, Hodges, Moore, Park & Kreamer as counsel for The Gas Service Company, and Spencer, Fane, Britt and Browne, as counsel for Kansas City Power and Light Company, for leave to file briefs as amici curiae be, and the same is hereby sustained.

[fol. 244]

IN THE SUPREME COURT OF MISSOURI

EN BANC

SEPTEMBER SESSION, 1962

No. 49 377

STATE OF MISSOURI, Respondent,

vs.

DIVISION 1287 of the AMALGAMATED ASSOCIATION OF STREET,
ELECTRIC RAILWAY, AND MOTOR COACH EMPLOYEES OF
AMERICA, et al., Appellants.

OPINION—Filed October 8, 1962

On Appeal from the Circuit Court of Jackson County
Honorable J. Donald Murphy, Judge

Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, an unincorporated, voluntary association of persons with headquarters at 1913 Tracy Avenue in the City of Kansas City, Missouri, defendants in the above entitled cause in the Circuit Court of Jackson County, Missouri, have appealed from a decree and permanent injunction entered in said cause on February 12, 1962, in favor of the State of Missouri. The judgment in said cause concluded, as follows: "Now, Therefore, It Is Ordered, Adjudged and Decreed that the defendants, and all of the persons to whom notice of this order of injunction may come, be and they are hereby permanently enjoined and restrained from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike *against the State of Missouri.*" (Italics ours.) See Section 295.200, subsections (1) and (6) RSMo 1959. Appellants seek to reverse the judgment and obtain a declaration that the King-Thompson Act, Chapter 295 RSMo 1959, under which the action was instituted, is unconstitutional and void in its entirety under the

Federal Constitution, although only portions of the mentioned Act are before the Court for construction on this appeal.

[fol. 245] The cause was in equity and it was tried by the court without the aid of a jury. Under Supreme Court Rule 73.01(b), applicable in such cases, it is provided that "all fact issues upon which no specific findings are made shall be deemed found in accordance with the result reached."

The case presents the issue as to whether the police power of the State may be exercised in an emergency and pursuant to state statutes to take over and maintain the operation of the public transportation system of a great city when the public interest, health and welfare of the State is jeopardized as the result of the sudden interruption and discontinuance of such service by reason of a strike by the employees of the transportation company against their employer. Appellants concede this is the issue in that they say: "Appellants basic position is that, *irrespective of the existence or non-existence of jeopardy by state standards*, the state procedure itself is beyond the power of the State to impose, and appellants' fundamental objective is to be free from its applicability at all. * * * In this posture, where the question goes to the validity of fastening the state procedure onto the litigant at all, existence of the power to act must first be decided." (Italics ours.)

The transportation company is not a party to this action. This suit was instituted by the State of Missouri against the defendants after the State had taken possession and control of the transportation facilities of the transportation company. The basis of the proceeding is that the employees of the Company by a concerted refusal to work for and under the supervision of the State, after the Company's equipment and transportation facilities had been taken over by the State, have violated the law of the State. The State obtained a temporary restraining order, which was subsequently followed, after hearing, submission and argument, by a permanent injunction, and from this judgment the defendants, as stated, have appealed.

The petition was filed on November 15, 1961, pursuant to the provisions of certain state statutes referred to as

[fol. 246] the King-Thompson Act, Chapter 295 RSMo 1959. This Act is entitled "An Act to provide for the mediation of labor disputes in public utilities; to create a board of mediation and to provide for the qualifications, powers, duties, compensation of the members of such board; to provide for the seizure and operation of public utilities by the state in order to insure continuous operation, to provide for the enforcement of this act and to prescribe penalties for any violation of this act." The mentioned Act has been before this Court for consideration on several previous occasions. See *State ex rel. State Board of Mediation v. Pigg*, 362 Mo. 798, 244 S.W.2d 75; *State v. Local No. 8-6, Oil, Chemical & Atomic Workers International Union, AFL-CIO*, Mo. Sup., 317 S.W.2d 309, vacated by the United States Supreme Court on the ground that the controversy had become moot (80 S.Ct. 391, 361 U.S. 363); *Rider v. Julian*, 365 Mo. 313, 282 S.W.2d 484. In this connection also see 29 U.S.C.A., Chapter 7, Sec. 152(2) defining the term "employer" under the Federal Act *as not applying to a state*. Of course, there is no question that the Federal labor legislation, 29 U.S.C.A., Sec. 141, et seq., in question here, encompassing as it does all industries and utilities "affecting commerce," applies to a privately owned public utility whose business and activities are carried on wholly within a single state, as well as it does to those that operate interstate. *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197.

The essential provisions of the King-Thompson Act, here in controversy, are Secs. 295.010, 295.180 and 295.200(1) and (6) RSMo 1959. These sections are, in part, as follows: Section 295.010 "Labor relations affecting public utilities—state policy. It is hereby declared to be the policy of the state that heat, light, power, sanitation, transportation, communication, and water are *life essentials of the people*; that the possibility of labor strife in utilities operating under governmental franchise or permit or under governmental ownership and control is a threat to the welfare and health of the people; that utilities so operating are clothed with public interest; • • • ." (Italics ours.) A similar declaration of the public policy of this State is announced [fol. 247] in the Public Service Commission Act by Sections

386.310, 386.570 and 386.580 RSMo 1959. Also see *State v. Local No. 8-6*, etc., *supra*, 317 S.W.2d 309, 316 (7, 8).

Section 295.180 RSMo 1959, in part, provides that "Should either the utility or its employees refuse to accept and abide by the recommendations made pursuant to the provisions of this chapter * * * or in the event that neither side has given notice to the other of an intention to seek a change in working conditions, and there occurs a lockout, strike or work stoppage which, in the opinion of the governor, *threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare*, then and in that case he is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest." (Italics ours.) (As we shall subsequently see, the Governor of the State acted under this provision of the statutes and took possession of that portion of the plant, equipment and transportation facilities of the Kansas City Transit, Inc., located exclusively in the State of Missouri.)

Section 295.200(1) RSMo 1959 provides: "It shall be unlawful for any person, employee, or representative as defined in this chapter to call, incite, support or participate in any strike or concerted refusal to work for * * * the state *after any plant, equipment or facility has been taken over by the state under this chapter*, as means of enforcing any demands against the utility or against the state." (Italics ours.) This particular statute must be read and construed together with Section 295.210 of the same chapter, as follows: "No employee shall be required to render labor or service without his consent; nor shall anything in this chapter be construed to make the quitting of his labor or services by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent."

Section 295.200(6) RSMo 1959 further provides: "The courts of this state shall have power to enforce by injunction or other legal or equitable remedies any provision of this chapter or any rule or regulation prescribed by the [fol. 248] governor hereunder."

As stated, the cause being in equity and having been tried before the court without the aid of a jury, we review the cause de novo and pursuant to Supreme Court Rule 73.01 (d) providing, in part, that "The appellate court shall review the case upon both the law and the evidence as in suits of an equitable nature. The judgment shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Briefly, some of the facts shown by the record are that the Kansas City Transit, Inc., (hereinafter referred to as the Company) operates a transportation system for passengers by bus in the States of Kansas and Missouri. It operates under a Certificate of Convenience and Necessity issued by the Public Service Commission of Missouri and a like certificate issued by the Kansas State Corporation. The Company's annual revenue received from bus transportation is approximately \$8,600,000. Of this sum 77 per cent is derived from transporting passengers wholly within the State of Missouri, 7 per cent from transporting passengers wholly within the State of Kansas and 15 per cent for transporting passengers between Missouri and Kansas. On a normal work day the number of passengers carried by the Company on the total system is approximately 150,000 persons. Of this number 115,000 travel exclusively in Missouri, 10,500 exclusively in Kansas and 24,500 travel interstate between points in Kansas and Missouri. The Company owns 401 busses and operates 234 on routes exclusively within the State of Missouri. The Company employs 950 persons and 817 are within the bargaining unit represented by the defendant Union. Of the employees within the bargaining unit 640 are bus drivers and 170 are maintenance employees; 665 live in Missouri. The Company annually spends about \$1,450,000 for fuels, materials and supplies. All of 401 busses owned by the Company were manufactured in states other than Kansas or Missouri and delivered to the Company in Missouri from other states. Prior to the difficulties in question here, the National Labor Relations Board had found that the Kansas City Transit, Inc. is engaged in commerce within the meaning of the [fol. 249] National Labor Relations Act. Kansas City Pub-

lie Service Co., 47 NLRB 1, 2. The NLRB has certified the Union as the representative of the employees within its bargaining unit and the most recent labor agreement was approved for a term from November 1, 1959 through October 31, 1960.

On August 15, 1961, the Company notified the Union of its desire to terminate the then existing agreement. On August 30, 1961, the Union notified the Company of its desire to negotiate changes in the agreement and identified the changes it proposed. The evidence shows the basic issues in dispute between the Union and the Company to be substantially as follows: "Wages, of course, were in dispute; vacations with pay; group insurance; pensions; disability allowances; sick leave; a different system of work day for all maintenance employees; a profit sharing plan; a cost of living plan; * * * runs, for example, in transportation; minimum guarantees; extra man's guarantee; bonus for drivers who would go a full year without an avoidable accident." The Union sent copies of its desired changes to the Federal Mediation and Conciliation Service and to the Missouri State Board of Mediation.

As indicated, the sixty-days' notice of proposed changes was sent to the Company and the thirty-day notice of dispute was sent to the Federal and State agencies. See 29 U.S.C.A. 158(d)(1) and (3); "Sec. 8(d)(1) and (3) of the Labor Management Relations Act, 1947." On October 19, 1961, the Federal Mediation and Conciliation Service began an attempt to mediate the dispute, and negotiations, since then, have been conducted with its assistance. However, the Union refused to accept the mediation services of the Missouri State Board of Mediation upon that Board's refusal to confine its services strictly to mediation efforts and not to submit recommendations for settlement, nor to publicize its meetings, or permit the attendance of third persons at any meetings. Ultimately, the negotiations between the Company and the Union reached an impasse and the Company refused to arbitrate the unsettled issues. A secret strike vote was taken, with 681 members favoring a strike, and a strike against the Company became effective [fol. 250] at midnight on November 13, 1961. Picket lines

were immediately established and continued until the evening of November 15, 1961.

Prior to the strike the Federal Mediation and Conciliation Service had cooperated fully with the State agencies having similar duties, including the Missouri State Board of Mediation. When it appeared that a strike was imminent, effective at midnight on November 13, 1961, the Governor of the State of Missouri issued a Proclamation to the effect that the contemplated strike threatened to interrupt the mass transportation operations in *Missouri* of the Kansas City Transit, Inc.; that after investigation, it was his opinion the public interest, health and welfare were jeopardized as the result of the impending interruption of the public transportation system in the *City of Kansas City, Missouri*, and it was necessary that he exercise the authority vested in him by Chapter 295, and particularly Section 295.180 RSMo 1959, to insure the operation in *Missouri* of the facilities of the Kansas City Transit, Inc., a public utility. On the same day the Governor of the State of Missouri issued his Executive Order in words and figures as follows:

"TO THE SECRETARY OF STATE:

"WHEREAS, there is a labor dispute existing between the Kansas City Transit, Inc., a public utility furnishing public passenger transportation service in the State of Missouri, and Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, recognized bargaining agent of certain of the employees of the Kansas City Transit, Inc.; and WHEREAS, as a result of such labor dispute there is a threatened strike on the part of the employees in *Missouri* of the Kansas City Transit, Inc., who are members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, which threatens the effective operation in *Missouri* of the Kansas City Transit, Inc., a public utility; and WHEREAS, in my opinion such threatened strike threatens to interrupt the operation in *Missouri* of the Kansas City Transit, Inc.; and WHEREAS, in my opinion the public interest, health and welfare are jeopardized; and WHEREAS, after investigation, I, JOHN M. [fol. 251] DALTON, Governor of Missouri, by Executive

Proclamation dated the 13th day of November, 1961, proclaimed:

"(1) That the continued operation of the Kansas City Transit, Inc., a public utility, is threatened as the result of a labor dispute.

"(2) That interruption of the operation of the Kansas City Transit, Inc., a public utility, is threatened as the result of a threatened strike on the part of employees of the Kansas City Transit, Inc., who are members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America.

"(3) That the public interest, health and welfare are jeopardized as the result of the threatened interruption of the operation of such public utility.

"(4) That the exercise of the authority vested in me by Chapter 295, and particularly Section 295.180, of the Revised Statutes of Missouri, 1959, is necessary to insure the operation in Missouri of the Kansas City Transit, Inc., a public utility.

"NOW, THEREFORE, I, JOHN M. DALTON, Governor of the State of Missouri, by virtue of the authority vested in me by Chapter 295, and particularly Section 295.180, of the Revised Statutes of Missouri, 1959, do hereby order as follows:

"I hereby take possession of the plants, equipment, and all facilities of the Kansas City Transit, Inc., *located in the State of Missouri, for the use and operation by the State of Missouri in the public interest*, effective at 11:59 o'clock P.M., Central Standard Time, Monday, November 13, 1961.

JOHN M. DALTON
Governor."

(All italics ours.)

The order was duly served on the Kansas City Transit, Inc., as stated, and a further order, effective November 13, 1961, at 11:59 p.m., was promulgated, in part, as follows, to wit:

"(1) That Daniel C. Rogers, Chairman of the Missouri State Board of Mediation, acting as my agent, is hereby authorized and directed to take possession of the plants, equipment and all facilities of the Kansas City Transit, [fol. 252] Inc., in the State of Missouri or such parts of each of said plants, equipment and facilities as may be necessary for the purpose of carrying out the provisions of this Order, and to effect my Proclamation and Executive Order No. 1 declaring the public interest, health and welfare jeopardized, in order to insure that the said utility above mentioned is effectively operated in the interest of the people of this State to the end that they may have the benefit of necessary and essential public utility services.

"(2) Said Daniel C. Rogers shall exercise the aforesaid authority as my agent forthwith, and he shall continue to exercise the aforesaid authority as my agent until and unless otherwise directed by me.

"(3) All rules and regulations of the aforesaid utility governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of Missouri.

"(4) This Order shall take effect at 11:59 P.M., Central Standard Time, November 13, 1961.

"Done this 13th day of November, 1961.

JOHN M. DALTON
Governor"

The record shows this was the third time that the plant, property and transportation facilities of the mentioned Company had been seized by the State of Missouri on account of a work stoppage by reason of a threatened strike by the employees against the Company. The dates of the previous seizures and the previous periods of operation by the State being, as follows: Seized April 29, 1950 and operated until December 11, 1950; seized November 6, 1957 and operated until March 6, 1958. Appendix A and Appendix B attached to respondent's brief show a record of other seizures and the operations under the Act in Missouri.

As stated, the strike was to begin at midnight on November 13, 1961, and the Union struck the Company at that time. The contract had expired October 31, 1961. The seizure was declared effective as of one minute before the strike was to become effective (11:59 p.m.). Thus the strike had been [fol. 253] *called* against the *Company* before seizure. Thereafter, the officers and members of defendant Union refused to operate the transportation facilities of the Company after its physical properties, plant and operating facilities were taken possession of and placed in the control of the State of Missouri. The strike previously called went into effect *after* seizure by the State and a concerted refusal to work for the State was *supported* and *participated in* by the defendants-appellants. As a result, no mass transportation was provided in the city and the present suit was instituted by the State on November 15, 1961, praying an injunction against the Union, its officers and members from continuing, inciting, supporting and participating in the work stoppage and refusal to work for and under the supervision of the State of Missouri in the operation of the mass transportation facilities of the Company. See Sections 295.200(1) and (6) and 295.210.

The petition charged that "such action on the part of the union and officers in calling, inciting, supporting and participating in said strike and concerted refusal to work for the State of Missouri" was unlawful under Chapter 295 RSMo 1959, and especially Section 295.200(1) thereof. We find it unnecessary to further review the detailed allegations and prayers of the State's petition for an injunction against the defendants, or to detail the provisions of the temporary restraining order and order to show cause, as entered on said date, nor do we find it necessary to review in detail the provisions of defendants' motion to dismiss the petition, or the detailed provisions of the subsequent answer filed by the defendants on December 7, 1961.

Defendants' motion to dismiss plaintiff's petition, as filed November 27, 1961, in part, stated: "The defendants state that Chapter 295, Revised Statutes of Missouri, 1949, and especially Sections 295.180 and 295.200 of said Chapter 295 are unconstitutional and invalid and all actions taken there-

under by the Governor of Missouri and Daniel C. Rogers are unlawful, invalid and without any force or effect for the reasons herein set forth and are in derogation of the rights, privileges and immunities granted to all members of the [fol. 254] defendant Amalgamated and guaranteed by the Constitution of the United States in Article I Section 8 and Article VI of said Constitution, and the Thirteenth and Fourteenth Amendments of the Constitution of the United States." The motion to dismiss was incorporated in the answer by reference. With reference to defendants' answer, it is sufficient to say that appellants' brief summarizes the grounds upon which the defendants defended the State's said action in the circuit court, as follows, to wit: "(a) The King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947. (b) The King-Thompson Act abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution. (c) As applied in this case, the King-Thompson Act (i) operates extraterritorially, and therefore conflicts with the constitutional requirement that a State confine its authority within its own borders; and (ii) directly regulates interstate commerce, and therefore offends the Commerce Clause of the United States Constitution independently of implementing legislation by Congress. [And] (d) The actual or threatened strike against the Company did not jeopardize the 'public interest, health and welfare' within the meaning of the King-Thompson Act."

In reference to point (d), *supra*, plaintiff's petition alleged "That upon taking possession of the plants, equipment and facilities of the Company by John M. Dalton, Governor of the State of Missouri, the employees and defendants herein have continued the labor dispute aforesaid, and on November 14, 1961, said employees and defendants herein failed and refused, and still fail and refuse, to perform work or labor for and *on behalf of the State of Missouri* in the furnishing of the transportation services aforesaid through the plants, equipment and facilities of The Company to the patrons of said company and to the people generally in the state of Missouri; that thus and thereby has been caused an actual interruption of the

operation of the transportation services, as aforesaid, of the public utility, Kansas City Transit, Inc.; that the interruption of the furnishing of such transportation services through the plants, equipment and facilities of The Com-[fol. 255] pany and the refusal of the employees to perform work and labor for and on behalf of the State of Missouri in the furnishing of such transportation service has jeopardized and threatened the public interest, health and welfare of the state of Missouri and of the inhabitants thereof." (Italics ours.) The defendants' answer to plaintiff's petition contained, among others, the following allegations: "It is specifically denied that any threatened or actual strike jeopardizes and/or threatens or jeopardized and/or threatened the public interest, health and welfare of the state of Missouri and of the inhabitants thereof. * * * Answering the allegations of paragraph 14, defendants aver that the employees have struck, and desire to strike, in furtherance of their collective bargaining demands made upon Kansas City Transit, Inc., and that defendants support and participate in such strike action. *Defendants deny that any such strike action is a strike against or a refusal to work for the state of Missouri.*" (Italics ours.)

In their brief filed in this Court appellants have further explained that "Grounds (a) and (b) have been heretofore decided adversely to appellants' position by this Court in *Missouri v. Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W.2d 309, vacated as moot, 361 U.S. 363. Grounds (c) and (d) are undetermined by and open under the latter decision. However, on the procedure to expedite the appeal sought by this motion, appellants would drop grounds (c) and (d) and confine their appeal to grounds (a) and (b). The expedited appeal would thus be limited to urging this Court to overrule its prior decision and would not urge reversal on grounds not comprehended by and considered in the prior decision. *In short, appellants on this procedure withdraw grounds (c) and (d) and urge only grounds (a) and (b).*" (Italics ours.) Appellants further point out that, after the appeal from the decree in this case had been taken, appellants alternatively moved this Court "either (1) to summarily affirm the judgment on the authority of this Court's decision in *Missouri v. Local*

No. 8-6, Oil, Chemical & Atomic Workers Union, 317 S.W.2d 309, vacated as moot, 361 U.S. 363, or (2) to expedite the appeal by submitting it on briefs without oral argument, [fol. 256] briefs to be simultaneously served within thirty days from the date of the order granting the motion to expedite the appeal." In pursuance to said request this Court, on April 9, 1962, entered its order refusing to summarily affirm the judgment of February 12, 1962, but granted leave "to submit appeal on briefs without oral argument," which was done.

While this Court refused to summarily affirm the judgment of the trial court in this case on the written request of appellants on the authority of this Court's decision in *State of Missouri v. Local No. 8-6, etc., supra*, 317 S.W.2d 309, vacated as moot by the United States Supreme Court in 80 S.Ct. 394, 361 U.S. 363, it does not necessarily follow that the opinion of this Court in that case, as reported in 317 S.W.2d 309, does not still represent the views of the members of this Court under the particular facts presented by the record in that case; however, the Supreme Court of the United States refused to review the validity of the injunction judgment entered in that case on the ground that *the injunction had expired by its own terms* and because of the uniform policy of that Court not to review a judgment, which if reversed, the court's action would be ineffectual for want of a subject matter on which it could operate. Although the judgment was vacated, as moot, it does not appear from the opinion vacating the judgment that the Supreme Court of the United States intended thereby to overrule the common law of this State, as evidenced by the cases cited at 317 S.W.2d 309, 314(2, 3) of this Court's opinion, or to substitute therefor any Federal common law contrary to that Court's holding in *Erie R.R. v. Tompkins*, 58 S.Ct. 817. Further, each case must be decided upon its own peculiar facts and upon the particular issues of law presented for decision, hence the opinion of this Court in *State v. Local No. 8-6, etc., supra*, is not necessarily controlling or decisive under the facts of the case at bar, and this Court properly refused to summarily affirm the present judgment on the basis of this

Court's prior judgment in another case, which had been vacated by the United States Supreme Court as moot.

In a motion filed by the appellants in this Court on May 9, 1962, appellants further state: "Independently of the [fol. 257] basis upon which the motion to expedite the appeal was made and granted, appellants on any procedure simply do not choose to present the jeopardy question. While appellants took issue with the reasonableness of the Governor's opinion before the Circuit Court, *that court decided the question adversely to appellants*. Appellants do not wish to pursue that point on appeal. *They acquiesce in respondent's position that the requisite jeopardy existed within the meaning of the King-Thompson Act.*" (Italics ours.) In a letter filed on June 5, 1962, in lieu of a reply brief, appellants (with reference to their counsel) state that "~~he could not more forcefully express than he did appellants' acquiescence in the existence of jeopardy within the meaning of the King-Thompson Act.~~" (Italics ours.)

Appellants take this position regardless of the fact that this court has construed the King-Thompson Act as follows: "The King-Thompson Act is strictly emergency legislation and is not a comprehensive code for the settlement of labor disputes in utilities * * *. Emergency legislation is justified under the police powers. 16 C.J.S., Constitutional Law § 198, pp. 972-973. The purpose of seizure is the preservation of community life as encouraged and fostered by the state. The purpose of the Act is to protect its citizens against disaster." State v. Local No. 8-6, etc., supra, 317 S.W.2d 309, 321.

Appellants in their statement of facts have substantially ignored the issue of jeopardy by the selection and statement of certain favorable evidence appearing in the record and ignoring much of the unfavorable evidence with reference to conditions existing during the two days in which the defendants, by concerted action, refused to work and operate the mass transportation system under the supervision and control of the State. In any event, what did happen during those two days is not necessarily decisive of the issues presented by plaintiff's action. Section 295.180 RSMo 1959 authorizes the Governor to act, when a lockout, strike or work stoppage occurs " * * * which, in the opinion

of the governor, threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare, * * * and in that case he is authorized to take [fol. 258] immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the "public interest." The statute is not limited to what *has* happened, but includes what *may reasonably be expected to happen*. It has been suggested that the trial court might well have taken judicial notice of what could and would happen to the inhabitants of a metropolitan area consisting of some one million, one-hundred thousand persons upon the *sudden and total* discontinuance of 90 per cent of the public mass transportation service of the city leaving more than 115,000 daily Missouri users of such services without any adequate substitute for such transportation services. Courts may not assume ignorance of what everybody knows (*Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17, 19; *City of St. Louis v. Pope*, 344 Mo. 479, 126 S.W.2d 1201, 1210); nevertheless, the record in this case fully supports the finding of the trial court on the issue mentioned. A court could well find from the record in this case that the further continuance of the concerted work stoppage by the defendants under the circumstances shown and the continued failure of the defendants to operate the mass transportation system of the city with the facilities and equipment of the transportation company, which had been taken over by the State and were under the supervision and control of the State, might well have resulted in extreme danger to the health, welfare and safety of the inhabitants of Kansas City, Missouri, and in unrest, general confusion, disorganization, excitement, tension, inability to reach places of work in the retail district of the city, reduction of employment and loss of wages by innocent victims of the strike, congestion of traffic, disruption of business, reduction and impairment of law-enforcement agencies and the creation of havoc, disaster and general chaos in the community. However, we need not further discuss *the issue of jeopardy to the community* within the meaning of the King-Thompson Act as construed by this Court, or the evidence upon which the trial court's finding was based, because that issue

is now conceded by the appellants, as hereinbefore and hereinafter stated.

With reference to the *State's operation* of the transportation system, the defendants' evidence tended to show that [fol. 259] the employees of the Company are not, and will not become, employees of the State of Missouri; that the employees are not paid by the State; that the State does not contribute to their social security or unemployment compensation benefits; that it does not pay their workmen's compensation claims, since these payments are made by the Company; and that the State does not direct the employees as to what to do or where to report for work, nor does it hire, discharge or discipline them or control any aspect of the employment relationship between them and the Company or consult with the Company concerning it.

Defendants also offered evidence tending to show that the State does not and is not authorized to expend any of the Company's money; that the State does not possess the Company's bank account; that the State officers do not sign its checks or collect its revenue or make reports to the State; that no financial reports have been requested concerning the Company's receipt of its funds and the State does not make purchases of supplies for the Company nor pay its bills. Defendants also offered testimony that no property of the company was actually conveyed, transferred or otherwise turned over to the State of Missouri, except as is evidenced by the Governor's Proclamations and Orders which were served on the Company and that a State agent was designated to act under said orders. There was also evidence that the State does not participate in the management of the Company, except as stated, and that the State is not consulted by the Company's board of directors or officers as to the conduct of the Company's business. The management of the Company remains exclusively in its board of directors and there has been no change of any kind in the conduct of its business by the Company, since the Company was served with the Governor's orders and the subsequent Proclamations, including the designation of the State's agent and the orders that said agent "shall exercise the aforesaid authority as my

agent forthwith, and he shall continue to exercise the aforesaid authority as my agent until and unless otherwise directed by me." The Governor's order also directed that "All rules and regulations of the aforesaid utility governing the internal management and organization of [fol. 260] the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of Missouri." In this connection we must say that defendants' answer admits that on the 13th day of November, 1961, said John M. Dalton, Governor of Missouri, under and by virtue of the authority vested in him by the Constitution of Missouri and statutes thereof, including Section 295.180 RSMo 1959, did take immediate possession of the plant, equipment and facilities of the said Kansas City Transit, Inc., "except that defendants aver that the taking of possession was to insure continuance of operations in the State of Kansas in addition to the State of Missouri." Defendants also offered in evidence the several Executive Orders and Proclamations of the Governor, including the one appointing Daniel C. Rogers as the Governor's agent, as hereinbefore stated, and containing the related orders with reference thereto.

Assuming that the trial judge accepted and believed the testimony of the defendants' witnesses with reference to the State's operation of the utility, yet the trial court may further have believed and found that there was no other possible or reasonable manner by which the State could operate the transportation system in Kansas City and protect its citizens, and particularly those citizens who were not interested in or participating in the strike of the defendants against their employer; and that the transportation system was being operated by the State, with the utility as its agent, in order to make use of the internal organization and well-established regulations of the utility company. See *Rider v. Julian*, supra, 282 S.W.2d 484, 494.

Before reviewing the issues presented on appeal, we must consider appellants' further statement that, although they defended this cause in the Circuit Court of Jackson County upon the ground that, "(c) As applied in this case, the King-Thompson Act (i) operates extraterritorially, and therefore conflicts with the constitutional requirement

that a state confine its authority within its own borders; and (ii) directly regulates interstate commerce, and therefore offends the Commerce Clause of the United States [fol. 261] Constitution independently of implementing legislation by Congress", nevertheless the appellants on this appeal *now desire to withdraw and do withdraw from the Court's consideration said ground (c)*, one of the grounds upon which the cause was submitted in the circuit court and which issue was found against the defendants. In a motion to strike certain matters filed in this Court on May 9, 1962, appellants further stated their position, as follows: "Appellants are unaware of any procedure by which a party can be required against his will to put in issue on appeal a matter he chooses not to contest."

We recognize that appellate courts customarily review cases on appeal on the basis of the issues presented by the appellants. In this case, as stated, the issues in dispute are solely between the State of Missouri and certain employees, who are on strike against the Company, and who, by concerted action, refused to operate the transportation facilities of the Company, after such facilities were in the legal possession of and under the supervision and control of the State.

As stated, the Company is not a party to this action. The pleadings and issues presented in the trial court do not present a labor dispute for decision between the Union and the Company. The trial court did not attempt to assume jurisdiction of a labor controversy or dispute, nor to decide any labor issues between employer and employees. The Governor of the State did not attempt to take possession or control of any physical property or transportation facilities outside of the State of Missouri. No state statute involved in this proceeding purports to require or attempts to carry on an interstate operation. The decree appealed from only enjoins defendants from supporting and participating in the concerted work stoppage and strike against the State of Missouri.

Further, the record shows that there has been no attempt, either by Executive Order, pleadings, judgment or acts in the instant case, to extend the jurisdiction of the State of Missouri into the State of Kansas. "A state may validly

regulate activities, persons, and property within its jurisdiction, although extraterritorial repercussions ensue, pro- [fol. 262] vided such regulation is vital to the welfare of its inhabitants, as the propriety of regulation is determined by its focus on internal problems, not by the range of its influence." 81 C.J.S., p. 861; Sec. 3; *Pacific Coast Dairy v. Department of Agriculture of California*, 318 U.S. 285, 295. The State did not take possession or control of the Company's property, or of any of its facilities *in any state other than the State of Missouri*. The decree conforms to the record and appellants may properly abandon any objection to the trial court's ruling on any defense submitted by them and overruled by the court, such as the defense set out in subdivision (c), *supra*.

Before considering appellants' brief as filed in this Court, we call attention to Supreme Court Rule 83.05, which expressly provides that "The brief for appellant shall contain: (1) * * * (the grounds on which jurisdiction is invoked); (2) A fair and concise statement of the facts without argument; (3) The points relied on, *which shall show what actions or rulings of the Court are sought to be reviewed and wherein and why they are claimed to be erroneous*, with citation of authorities thereunder * * * (e). Points Relied On. The points relied on *shall briefly and concisely state what actions or rulings of the Court are claimed to be erroneous and briefly and concisely state why it is contended the Court was wrong in any action or ruling sought to be reviewed. Setting out only abstract statements of law without showing how they are related to any action or ruling of the Court is not a compliance with this rule.*" (Italics ours.)

Appellants' statement of facts in their brief violates this rule in that it is argumentative, emphasizes the facts favorable to appellants and omits many facts unfavorable to appellants. Further, appellants not only argued the facts in the statement of facts, but also argued issues of law. An opinion of this Court is cited and quoted from at some length in appellants' statement of facts. The brief is also subject to further criticism in that, under "Points and Authorities," appellants do not mention or refer to the judgment appealed from, nor do appellants briefly or

concisely state what actions or rulings of the trial court [fol. 263] are claimed to be erroneous or why any particular designated action of the trial court was wrong.

The four points relied on for reversal are stated in the brief as follows: "I. The King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947 * * * II. Prohibition of a public utility strike, without substituting a compensating equivalent for it, offends substantive due process. * * * III. Prohibition of a public utility strike, without substituting a compensating equivalent for it, results in involuntary servitude. * * * IV. To forbid a person to 'incite' or 'support' a strike or refusal to work is unconstitutional for the dual and interlocking reasons that it abridges free speech and has the vice of vagueness." Many of the subheadings under the respective main headings are abstract statements of law. Except for the fact this case involves matters of great public importance, we should not hesitate to dismiss this appeal for the failure of appellants to comply with the rules of this Court governing the preparation and contents of appellants' briefs.

Appellants in their statement of facts say that their "brief is confined to showing that the King-Thompson Act is invalid upon the ground that (1) it is in conflict with and preempted by the Labor Management Relations Act, 1947, and that (2) it abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution"; however, under "Points Relied On" appellants have designated only the *four points* hereinbefore referred to. At no place in appellants' brief do they claim they had the right to strike against the State and in their answer denied that they did so, yet *essentially that is what the judgment appealed from expressly enjoined*. Further, under "Points Relied On" there is no assignment that the trial court erred in entering the particular judgment and decree that the court did enter in this case.

After the petition for an injunction was filed, the appellants filed a motion to dismiss the petition and then offered evidence in support of it. See Supreme Court Rules 55.29, 55.31, 55.33. The motion to dismiss was in effect overruled, [fol. 264] the temporary injunction was continued in effect,

defendants' answer was then filed, evidence was heard and the judgment appealed from was entered. No motion for a new trial was filed, heard or ruled because not required by Supreme Court Rule 79.03. The appeal was, therefore, taken from the judgment on the merits and there is no assignment under Points and Authorities that the court erred in overruling appellants' motion to dismiss the petition, an assignment that would have presented an issue of law.

As stated, the first point relied on by appellants is that "The King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947." This assignment is *not* directed to what the trial court decided, but seeks an *advisory opinion* as to the validity of all of the provisions of a state act, including many matters not in issue in any manner in this case, nor decided by the trial court. *Atchison v. Retirement Board of Police Retirement System of Kansas City, Mo. Sup.*, 343 S.W.2d 25, 35; *State of Missouri ex rel. Jenkins v. Bradley, Mo. Sup.*, 358 S.W.2d 38, 39. Judicial review will not be accorded questions which are not directly and necessarily involved in the particular legal situation presented on appeal. *Juengel v. City of Glendale, Mo. Sup.*, 161 S.W.2d 408, 409(2); *Kansas City, Mo., v. Williams*, 8 Cir. 205 F.2d 47, 51(3), certiorari denied 346 U.S. 826. Further, Supreme Court Rule 83.13(a) governing appeals expressly provides that "no allegations of error shall be considered in any civil appeal except such as have been presented to or expressly decided by the trial court." It will be noted that Point I is an attack upon the King-Thompson Act in its entirety. In effect, the point may be referred to as a "shot-gun approach" intended to abolish the Act "lock, stock and barrel," regardless of what issues were presented to and ruled by the trial court.

In making this assignment the appellants, of course, ignore the holding of this Court in *State ex rel. State Board of Mediation v. Pigg*, supra, 244 S.W.2d 75, in which this Court held that certain provisions of the Act were *severable*, particularly those sections directly affecting the State Board of Mediation, its legal existence, powers and duties. 244 S.W.2d 75, 79(7). The first eight sections of the

[fol. 265] King-Thompson Act, Secs. 295.010-295.080 RSMo 1959, V.A.M.S., declaring state policy, defining terms, creating the Board and defining its duties; powers and mediation services, were also held *not* to be in conflict with the Labor Management Relations Act, 1947, particularly in view of Secs. 202(c) and 203(b), 29 U.S.C.A. Secs. 172(c) and 173(b), which contemplate the existence of state boards and cooperation with them. 244 S.W.2d 80(8, 9). This ruling in the Pigg case was approved by this Court in *State v. Local No. 8-6, etc.*, supra, 317 S.W.2d 309, 315(4), where it was *further* held that the sections considered and ruled in *State v. Local No. 8-6, etc.*, supra, were also *severable* from and could stand independently of the remainder of the Act, since the remaining sections of the Act were not before the Court for consideration in that case. 317 S.W.2d 309, 323.

Further, the point relied on does *not* in any subhead thereunder direct attention to any particular section of the King-Thompson Act, although under subhead (f) Sections 295.010, 295.090, 295.100, 295.120, 295.150, 295.160 and 295.200.5 are cited, but these sections are not the sections presented to and ruled on by the trial judge. Appellants' first subpoint under Point I is that "The operations of the Company affect interstate commerce so as to bring its labor relations within the governance of the Labor Management Relations Act, 1947, and to subject it, its employees and the Union to the jurisdiction of the National Labor Relations Board." This abstract statement of law is not questioned by respondent at any place in the record and it is fully conceded by the Governor's Proclamation. Further, the appellants on this appeal have expressly waived any claim for reversal on the ground that the King-Thompson Act "directly regulates interstate commerce, and therefore offends the Commerce Clause of the United States Constitution."

In further support of appellants' first point, it is contended that "The protective applicability of the national Act to strikes conducted by public utility employees cannot be displaced because of the public character of a utility and its historic amenability to control, the importance of uninterrupted utility services to the community, or the

[fol. 266] duty to render continuous service." No such issue was ruled by the judgment entered. It is further contended that the heart of the National Act is the right to engage in free and private collective bargaining backed by the right to strike; and that in prohibiting any "concerted refusal to work" for the state after any plant, equipment or facility has been taken over by the state, the King-Thompson Act is in irreconcilable conflict with the National Act because the King-Thompson Act "forbids peaceful strikes to enforce union demands for wages, hours and working conditions." No section of the King-Thompson Act prohibiting free and private collective bargaining or peaceful strikes to enforce union demands is cited in support of the last quoted statement; however, the Act does make *unlawful the concerted refusal to work for the State in the operation of the utility after any such plant, equipment, or facility has been taken over by the State in an effort to protect the public by use of the police power of the State*. Appellants expressly admit that the right to strike enjoys constitutional protection only "against unreasonable legislative prohibition or curtailment."

In consideration of the above arguments it must be kept in mind that employees of a public service corporation upon entering such service assume an implied obligation to perform their duties in such a manner as will enable the corporation to discharge its obligations to the public. 35 Am. Jur., Master and Servant, p. 514, Sec. 82. See also *Wilson v. New*, 243 U.S. 332, 353. The Public Service Commission law recognizes this and imposes penalties on employees as well as on utilities for their wrongful acts. Sec. 386.580 RSMo 1959. Further, employees in accepting employment by a public utility, *such as a utility operating mass transportation services in a great city*, must to some extent surrender certain rights and their employment is subject to the police power of the State in emergencies and when the operating properties are taken over by the State.

In the case of *United Public Workers of America, v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 567, in construing and upholding the Hatch Act, 18 U.S.C.A. §§ 61h and 61o, which declared unlawful certain specified political activities [fol. 267] of Federal employees, the United States Supreme

Court pointed out that fundamental human rights were not absolutes and that the "court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." A restriction against taking "any active part in political management or in political campaigns" was approved. Also, the acceptance of numerous other types of employment necessarily requires the surrender of what would otherwise constitute the invasion of personal rights as, for example, in the case of *Fraternal Order of Police v. Harris*, 306 Mich. 68, 10 N.W.2d 310, 312, where the court said: "Those who serve the public, either as the makers of the law, the interpreters of the law, or those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights." Restrictions upon the political activities of civil service employees of the City of St. Louis was upheld although attacked on constitutional grounds of interference with freedom of speech and the deprivation of property and liberty without due process of law. *State ex inf. McKittrick ex rel. Ham v. Kirby*, 349 Mo. 988, 163 S.W.2d 990; and see *King v. Priest*, 357 Mo. 68, 206 S.W.2d 547, 556, appeal dismissed, 68 S.Ct. 736, rehearing denied 68 S.Ct. 901, where it was held that certain rules and regulations adopted by the Police Department of the City of St. Louis were not unconstitutional in denying appellants and other members of the police department the right of freedom of speech and freedom of assembly and petition contrary to the First Amendment and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States. Further, *in accepting employment with a company operating a mass transportation system in a great city of this State* the employees must be assumed to have done so in view of the State law governing the operation of such companies and providing for State operation in temporary emergencies to protect the public from disaster, and such law necessarily became a part of their contract of employment. See *Metropolitan Life Ins. Co. v. Siebert*, 72 F.2d 6; *Gray v. Metropolitan Life Ins. Co.*, Mo. App., 150 S.W.2d 563, 564(4).

[fol. 268] Appellants further argue that while a public utility strike may cause a local "emergency," judged by local standards, such "emergency" does not justify state prohibition or *curtailment of a strike by the employees of a utility against their employer*. Again, appellants refuse to consider the issue decided by the court as evidenced by the judgment entered. The argument overlooks the fact that the decree enjoined only the concerted refusal to work for and under the supervision of the State in the operation of the mass transportation system. The Act does not prohibit or curtail strikes by employees, absent an emergency jeopardizing the health, welfare and safety of the public sufficient to authorize and sustain the action of the Governor in taking possession and control of the physical properties, plant and transportation facilities of the employer-company against which the strike is directed. Even then judicial action is required to obtain enforcement. Further, the argument ignores appellant's admission of the existence of *jeopardy* under the provisions of the Act, *as construed by this Court*. The facts and admissions therefore bring this case *within the exceptions*, as stated, in that the issue is *not the regulation of any protected activity of a labor union* and no unfair labor practice is charged or shown. No issue, such as to picketing, peaceful or otherwise, is involved, nor was any such issue decided by the trial court. The issue is as to the right of the State *to protect the public in an emergency situation from disaster* resulting from disputes between employers and employees after state seizure of the physical properties.

A strike or lockout which jeopardizes the public health, safety and welfare is not a protected activity under the National Labor Management Relations Act, 1947. This Court in the case of *State v. Local No. 8-6, etc., supra*, 317 S.W.2d 309, 319(11) pointed out that the congressional declaration in Section 1(b) of the Act, 29 U.S.C.A., Sec. 141(b) clearly indicated a purpose to subordinate industrial strife to the public health, safety and welfare; and that consistent with the subordination of labor acts and practices which jeopardize the public interest, it is clear that Congress did not intend to remove any existing "limitations [fol. 269] or qualifications" on the right to strike. The

United States Supreme Court has in numerous cases, as set out in this Court's opinion (317 S.W.2d 309, 319[11]), recognized that the violation of *local laws* enacted for the preservation of property rights and personal safety are not protected by the Federal Act. It is there further pointed out that such holdings are consistent with the congressional intent as expressed in other acts where the exercise of the police power in local government is particularly suitable.

This Court also pointed out in *State v. Local No. 8-6*, etc., supra, 317 S.W.2d 309, 321 (13), that a growing number of decisions of the United States Supreme Court indicate a considerable area where state activity and regulation is permitted. The cases which support that conclusion are reviewed and considered in the mentioned opinion, 317 S.W.2d 309, 321 (13). The judgment in question here does not purport to deal with rights between the employer and the employees. It was entered after the State's seizure of the physical properties of the utility and it only enjoined the appellants "from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri." (Italics ours.) Further, we cannot and do not construe the King-Thompson Act as making any provision for the *permanent operation* of a utility by the State after any such seizure. The Act as construed by the officials of this State in administering it show that the Governor may release the control of a utility's physical property at any time after seizure. (See Appendix A and Appendix B set out at the close of this opinion.) We find nothing in the Act to prevent appellants from making application to the Governor at any time for the release of the property of the utility upon reasonable notice and terms and any such release would relieve appellants from the particular judgment entered in this case. Further, as hereinafter mentioned, in the event of the denial of such relief appellants could apply to the trial court for a modification of the judgment theretofore entered.

While Section 295.180 RSMo 1959 provides that "whenever such public utility, its plant, equipment or facility has [fol. 270] been or is hereafter so taken by reason of a strike, lockout, threatened strike, threatened lockout, work stoppage or slowdown, or other cause, such utility, plant, equip-

ment or facility shall be returned to the owners thereof as soon as practicable after the settlement of said labor dispute, and it shall thereupon be the duty of such utility to continue the operation of the plant facility, or equipment in accordance with its franchise and certificate of public convenience and necessity" (*italics ours*), nevertheless there is no provision in the Act requiring state operation and control, until a settlement of the labor dispute has been reached, and we find no authority requiring us to so hold. Absent substantial evidence of the existence of an emergency threatening the public health, safety and welfare with impending disaster (as hereinbefore stated and previously held), state operation and control of the assets of a utility and a permanent injunction against concerted refusal to operate the utility's property cannot be sustained. Seizure and injunctive relief are provided only in emergency situations. We must and do construe the term "emergency" to imply a temporary situation and necessarily dependent upon the particular facts of the particular case under consideration. Nor can we construe the Act as authorizing a permanent injunction prohibiting defendants from striking against either the Company or the State and, therefore, the court should have retained jurisdiction of the cause, so that the equitable relief granted might be modified in accordance with changing conditions.

As stated, the right of the Union to engage in a peaceful strike against the utility is not denied by the Act, except by the limitations which are imposed during emergency situations and only after state seizure; however, the decree appealed from does not deny the right of appellants to strike against the Company, and that issue was not decided by the court. In the case of *State v. Local No. 8-6*, etc., *supra*, 317 S.W.2d 309, 321, this Court, as stated, said: "The King-Thompson Act is strictly emergency legislation and is not a comprehensive code for the settlement of labor disputes in utilities as the Wisconsin Act appeared to be. Emergency legislation is justified under the police powers. [fol. 271] * * * The purpose of seizure is the preservation of community life as encouraged and fostered by the state. The purpose of the Act is to protect its citizens against disaster. As previously indicated, we deem the strike in the circumstances in this case to be unlawful * * *"

Clearly the Legislature did not intend that disaster conditions to the public and the creation of emergency situations endangering the health, safety and welfare of the general public should be used for the purpose of obtaining the settlement of even peaceful strikes.

There is no contention here by the State, nor has this Court held that the total stoppage of the mass transportation system in Kansas City, after reasonable notice and an opportunity to the public to adjust to such a situation, would create a *permanent emergency situation* entitling the State to a permanent injunction against a concerted stoppage of work, or authorizing the State to indefinitely operate the transportation system on the theory of protecting the citizens *from disaster in an emergency situation*. Nor does this Court expect to so hold. However, in this case, jeopardy to the public, within the meaning of the provisions of the Act and as construed by this Court, is now admitted by appellants to have existed at the time of the seizure and the entering of the judgment appealed from.

If the emergency situation no longer in fact exists, appellants may apply to the court for a modification of the decree on terms, since it is not this Court's purpose or intention to hold that the mere total discontinuance of mass transportation services in Kansas City, Missouri, after reasonable notice to the public will necessarily create such an emergency or evidence such an impending disaster to public health, safety and welfare as to justify permanent injunctive relief under the King-Thompson Act.

In their printed argument the appellants undertake to support their attack upon the entire King-Thompson Act, as being in conflict with and pre-empted by the Labor Management Relations Act, by citing Section 295.200 RSMo 1959 and by stating that it "prohibits a strike as a means of enforcing demands", however, defendants do not claim *the* [fol. 272] *right to strike against the State* and in their answer to plaintiff's petition *they expressly denied that they did strike against the State*, although the fact that, by concerted action, they refused to operate the mass transportation system under the State's supervision and control, until the injunction decree was entered, is not disputed.

Appellants make numerous arguments and contentions with reference to the invalidity of the King-Thompson Act considered as a whole, as stated, under Point I of their "Points Relied On." However, the Act, considered as a whole, is not before the Court for consideration, nor was it before the trial court, nor was its validity as a whole considered or ruled. Appellants are limited to a consideration of the judgment entered, which specific judgment they have elected to ignore in their brief. It will be unnecessary to review in detail the subpoints set out in appellants' brief, since appellants' attack on all sections of the King-Thompson Act is primarily based upon the decision of the Supreme Court in the case of *Amalgamated Ass'n of St., Elec. Ry. & Mtr. Coach Employees of America, Div. 998, et al., v. Wisconsin Employment Relations Board*, 340 U.S. 383.

Before considering that case in some detail perhaps we should say that experienced lawyers and competent judges have long since ceased to accept, as legal authority, mere casual statements in the opinion of any court, particularly where such statements are unrelated to the facts and issues presented for decision. Mere obiter, or a speech by the writer of an opinion, must not be confused with the *decision of the court* based upon the facts shown by the record and by the legal issues presented to and decided by the court.

A mere casual examination of the Wisconsin Act, which was considered in the *Amal. Ass'n* case (Wisc. Statute 1949, Sec. 111.50 to 111.63), shows that the similarities between the Wisconsin Act and the King-Thompson Act, Chapter 295 RSMo 1959, are very superficial, while the differences are fundamental. These differences clearly appear from even a casual examination of the opinion of Chief Justice Vinson in the *Amal. Ass'n* case, from which opinion we shall quote at some length. These fundamental differences are [fol. 273] shown, as follows, in the *Amal. Ass'n* opinion. The court said: "Whenever such an 'impasse' occurs, the Wisconsin Employment Relations Board is empowered to appoint a conciliator to meet with the parties in an effort to settle the dispute. . . . In the event of a failure of conciliation, the Board is directed to select arbitrators who shall 'hear and determine' the dispute. . . . In summary, the act substitutes arbitration upon order of the Board for

collective bargaining whenever an impasse is reached in the bargaining process. And, to insure conformity with the statutory scheme, Wisconsin *denies to utility employees the right to strike.* (340 U.S. 383, L.C. 388) * * * However, the Wisconsin Act before us is not 'emergency' legislation but a comprehensive code for the settlement of labor disputes between public-utility employers and employees. Far from being limited to 'local emergencies,' the act has been applied to disputes national in scope, and application of the act does not require the existence of an 'emergency.' (L.C. 393-394) * * * And, where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law. (L.C. 394) * * * Michigan, in O'Brien, sought to impose conditions on the right to strike and now Wisconsin seeks to abrogate that right altogether insofar as petitioners are concerned. (L.C. 395-396) * * * Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation. *Fifth.* It would be sufficient to state that the Wisconsin Act, *in forbidding peaceful strikes for higher wages in industries covered by the Federal Act, has forbidden the exercise of rights protected by § 7 of the Federal Act.*" (L.C. 397-398) (Italics and local citations ours.)

[fol. 274] After pointing out further specific conflicts between the Wisconsin Act and the policies of the National Act the opinion concludes: "Having found that the Wisconsin Public Utility Anti-Strike Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand." (L.C. 399.)

The King-Thompson Act is so *fundamentally different* from the Wisconsin Act that the mentioned case does not apply and further the judgment appealed from in this case

is so totally different from the Wisconsin judgment, which was reversed, that the Wisconsin case could not apply and is not controlling.

The King-Thompson Act makes no provision for arbitrators who shall hear and finally *determine* labor disputes, nor does the King-Thompson Act deny to utility employees the right to strike. No issue as to compulsory arbitration is presented on this record. The Act does provide for the safety of the public in the event of a strike and the Governor's finding of emergency and for judicial proceeding after the State has taken possession of the utility's property. There is no provision in the King-Thompson Act purporting to provide for concurrent *state regulation* of peaceful strikes for higher wages. In any event that is not the issue in this case. Further, the King-Thompson Act has been held by the highest court in Missouri to be emergency legislation; and that "The purpose of seizure is the preservation of community life as encouraged and fostered by the State. The purpose of the Act is to protect its citizens against disaster." 317 S.W.2d 309, 321. Appellants have failed to point out wherein by the King-Thompson Act "the State seeks to deny *entirely* a federally guaranteed right," (*italics ours*) or wherein the Act has been applied to "disputes national in scope." No section of the King-Thompson Act seeks to abrogate the right of employees to strike against their employers, prior to the state's seizure of the utility, and the judgment here does not mention the employer. The employer-employee relationship is not the subject matter of the action. Further, we find no provision of the National Labor Relations Act *authorizing* a strike against the state, and the Federal legislation in question [fol. 275] does not pre-empt the right of the State to obtain the decree in question here.

Further, it is well settled that the exercise of the police power of a state is superseded only where the repugnance or conflict with a Federal act is so direct and positive that the two acts cannot be reconciled. *United Const. Workers, Affiliated with United Mine Workers of America v. Laburnum Construction Corp.*, 347 U.S. 656; *Breard v. City of Alexandria*, 341 U.S. 622. As stated by Mr. Chief Justice Hughes in *Kelly v. State of Washington*, 302 U.S. 1, 10:

"The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" And see *State v. Local 8-6*, etc., *supra*, 317 S.W.2d 309, 321.

It would unduly extend this opinion to review and distinguish the many cases relied upon by appellants to obtain the reversal of the present judgment. Perhaps a few other cases than the *Wisconsin* case should be referred to. Appellants cite the case of *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, and say that "Seizure is the particular technique employed by the King-Thompson Act to signal the prohibition of a utility strike"; that "the Supreme Court settled the question * * * when it held that the President had no constitutional power to seize the steel mills to avert a national emergency, and premised this conclusion in significant part on the fact that Congress in the Taft-Hartley Act had withheld seizure authority from the President even in national emergency strikes"; and that "the power to seize which Congress withheld from the President to avert a national emergency it did not grant to a State Governor to avert a local emergency." In making the above arguments, the appellants overlook the fact that the Governor of Missouri acted upon legislative authority granted by the State Legislature under the police power of the State; and that the decree appealed from by appellants was entered after notice and a hearing in a judicial proceeding.

Appellants also cite *Weber, et al., v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480, where, in a dispute between two unions [fol. 276] over work being performed for their employer, each claiming the work for its own members, one union went on a strike and the employer filed with the National Labor Relations Board a charge of an unfair labor practice under Section 8(b)(4)(D) of the Taft-Hartley Act against the striking union, but the Board held that no "dispute" existed within the meaning of that subsection and quashed the notice of a hearing. The employer then filed a complaint in a Missouri state court alleging violation of other subsections

of the Taft-Hartley Act and also a violation of the State's restraint of trade statute. The state court enjoined the strike as a restraint of trade, but the United States Supreme Court held that the state court was without jurisdiction to enjoin the conduct of the union since its jurisdiction had been pre-empted by authority vested in the National Labor Relations Board with reference to unfair labor practices. It will be noted that that case was instituted in the state court by the employer for an injunction to restrain picketing of the plant by defendants (employees) on the ground that it was in furtherance of an unlawful conspiracy and in restraint of trade. In other words, the action was between the employer and the employee, while in the case now before this Court the employer, Kansas City Transit, Inc., is not even a party to the record, which is wholly between the State of Missouri and the defendants-appellants, and no unfair labor practices are involved. Other cases cited by appellants are also easily distinguishable from the present proceeding.

Appellants also argue that the failure of the Senate of the 86th Congress to approve the Holland Amendment and the previous rejection by Congress of certain other proposals must be construed as supporting appellants' construction of certain cases previously decided by the Supreme Court. We do not consider the cases relied upon to be controlling in this case, nor do we consider the rejection of the various mentioned proposals to be of any significance. We find no merit in appellants' Point I of their brief insofar as it applies to any issue presented to and decided by the trial court in this proceeding.

Under Point II appellants say that "prohibition of a public utility strike, *without substituting a compensating equivalent for it*, offends substantive due process." The assignment [fol. 277] is an abstract statement of law, not directed to the judgment appealed from and it does not comply with the rules of this Court as a proper assignment. No constitutional provision is cited by number. The right to strike is not in question in this case as "the right to strike" is generally understood, to wit, against a private employer. Appellants further argue that "To prohibit public utility employees from striking cripples their ability through collec-

tive bargaining to induce their employer to grant satisfactory terms and effectively compels them to work under terms unilaterally dictated by the employer." Again, that issue is not before the court for consideration, since the appeal is from a particular judgment which does not concern the right of public utility employees to strike against their employer and there is nothing in the King-Thompson Act to prevent peaceful strikes where public safety is not endangered. *The King-Thompson Act deals with the protection of the public, after such a strike has been called or has been put into effect and after public safety, health and welfare is sufficiently endangered to require the State to be concerned with the operation of the utility and has taken possession of its physical property and seeks to operate the utility under its supervision to prevent public disaster.*

It is further argued that "A statute is arbitrary and capricious . . . when it sacrifices the employees' interest in a fair wage and working conditions by depriving them, without any compensating equivalent, of the right to strike, their only effective weapon in the competition over the division of the joint product of capital and labor." Again, *that is not the issue presented by the appeal from the judgment* and, for that matter, the particular assignment that "Prohibition of a public utility strike, *without substituting a compensating equivalent for it*, offends substantive due process" (italics ours) was not an issue presented to or decided by the trial court and hence it is not for review here, nor does any provision of the King-Thompson Act, as stated, contain any provision prohibiting public utility employees from striking against their private employer, except that [fol. 278] under the present judgment they are enjoined from striking against the State during state operation of the utility.

As stated, the third assignment under Points and Authorities in appellants' brief is that "Prohibition of a public utility strike, *without substituting a compensating equivalent for it*, results in involuntary servitude." Appellants argue that the provision of the King-Thompson Act prohibiting concerted refusal to work for or to strike against the State, after the State, in an emergency to protect its people under the police power, has taken possession of a

strike-bound utility, imposes involuntary servitude. This argument ignores and fails to give consideration to Section 295.210 RSMo 1959, the closing provision of the King-Thompson Act. We find nothing in the record presented on appeal to show that either Point II or III in the form presented here was directly presented to or passed upon by the trial court, or that either point was impliedly ruled by the judgment entered. However, we approve the reasoning and ruling of this Court on somewhat similar issues in *State v. Local No. 8-6, etc., supra*, 317 S.W.2d 309, 325(22).

Appellants' fourth point, as stated, is that "To forbid a person to 'incite' or 'support' a strike or refusal to work is unconstitutional for the dual and interlocking reasons that it abridges free speech and has the vice of vagueness." This contention, like the two previous ones, is not directed to the *particular decision* as made by the court under the particular facts of this case, and again appellants seek an advisory opinion upon hypothetical issues which were not ruled and decided. Clearly there is nothing in the decree as entered that interferes in any way with employees' expressions of distaste for the employer's practices insofar as they relate to their relationship to the private employer, the utility or transportation company. Appellants' argument assumes that the decree is directed to a strike against the Company rather than a concerted refusal to operate the mass transportation system under state control.

Further, with reference to the issues attempted to be raised by appellants' Points II, III and IV, perhaps we [fol. 279] should say that, while in the closing portion of what appellants call a "Statement of Facts", the appellants say that their "brief is confined to showing that the King-Thompson Act is invalid upon the ground (1) that it is in conflict with and preempted by the Labor Management Relations Act, 1947, and (2) that it abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution," yet these latter issues are not properly presented for decision under Points and Authorities. As stated, the last three assignments do not comply with the rules of this Court governing appellate briefs. All of the assignments are, however, in effect, more or less directed to alleged violations by the decree of

appellants' alleged rights under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States. It is sufficient to say that, substantially, the same issues were raised and arguments made with reference to this same King-Thompson Act in the case of State v. Local No. 8-6, etc., supra; and that said issues were therein ruled adversely to appellants' contentions, as may be noted by reference to the report of that case in 317 S.W.2d 309, 324(19), 325(22), and this Court again approves the rulings in said opinion with reference to said issues, although said issues are not properly raised and presented for decision in this case and are not before this Court for decision at this time.

As hereinbefore indicated, the judgment entered is modified so that the trial court retains jurisdiction of the cause, so that it may modify its decree in accordance with changing facts and conditions as hereinbefore indicated. As modified the judgment is affirmed and the cause is remanded.

S. P. Dalton, Judge.

All concur

**The Following Information on 9 Seizures under the King-Thompson
Act Was Compiled from the Records of the Missouri State Board
of Mediation, Jefferson City, Missouri**

<u>Case</u> <u>Year No.</u>	<u>Style of Case</u>	<u>Contract</u> <u>Expired</u>	<u>Strike</u> <u>Started</u>	<u>Seizure</u> <u>Started</u>	<u>Seizure</u> <u>Ended</u>
1950 167	Kansas City Public Service Com- pany, Div. 1287, Amal. Assn. of St. Elec. Rlwy. and Mtr. Coach Emp. of America	12/31/49	4/29/50	4/29/50	12/11/50
1950 164	St. Louis Public Service Com- pany, Local 788, Amal. Assn. of St. Elec. Rlwy. and Mtr. Coach Emp. of America	12/31/49	8/10/50	8/10/50	10/19/50
1955 560	St. Louis Public Service Co., Div. 788, Amal. Assn. of St. Elec. Rlwy. and Mtr. Coach Emp. of America	2/28/55	10/10/55	10/11/55	11/23/55
1956 645	Laclede Gas Company Local 8-194, Oil, Chemical and Atomic Workers Int'l. Union	6/30/56	7/1/56	7/5/56	10/31/56
646	Laclede Gas Company Local 8-6, Oil, Chemical and Atomic Workers Int'l. Union				
647	Laclede Gas Company Local 8-109, Oil, Chemical and Atomic Workers Int'l. Union				
1956 650	Kansas City Power & Light Com- pany, Local 412, IBEW	6/30/56	7/5/56	7/6/56	7/17/56
651	Kansas City Power & Light Com- pany, Local 1464, IBEW				
652	Kansas City Power & Light Com- pany, Local 1613, IBEW				
1957 708	Kansas City Power and Light Com- pany, Local 1464, IBEW	6/30/57	8/26/57	8/31/57	6/25/58
709	Kansas City Power and Light Com- pany, Local 412, IBEW				
710	Kansas City Power and Light Com- pany, Local 1613, IBEW				
1957 737	Kansas City Public Service Com- pany, Div. 1287, Amal. Assn. of St. Elec. Rlwy. and Mtr. Coach Emp. of America	10/31/57	11/6/57	11/6/57	3/6/58
1950 889	Kansas City Power and Light Com- pany, Local 1464, IBEW	6/30/60	7/12/60	8/6/60	7/1/61
1961 957	Kansas City Transit (formerly Pub- lic Service Company) Div. 1247, Amal. Assn.	10/31/61	11/13/61	11/13/61	still un- der seiz- ure

Respectfully submitted,

MISSOURI STATE BOARD OF MEDIATION

Daniel C. Rogers

May 16, 1962

Daniel C. Rogers

Chairman

Non-Seizure Cases under the King-Thompson Act

No.	Year	Case No.	Style of Case	Strike Started	Strike Ended
(1)	1948	24	Associated Highway Carriers, In. Local No. 41—Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Kansas City)	3/8/48	3/14/48
(2)	1952	267	Southwestern Bell Telephone Co. Communications Workers of America Division 20	3/6/52	3/10/52
(3)	1952	280	Capital City Telephone Company Local No. 2, IBEW	3/28/52	4/2/52
(4)	1952	367	Motor Carriers Council of St. Louis, Local 600, District 9, Teamsters, Chauffeurs, Warehousemen & Helpers of America (St. Louis)	6/30/52	8/2/52
(5)	1952	293	Grundy Electric Coop., Inc., Local No. 53, IBEW	8/29/52	8/31/52
(6)	1953	418	Capital City Telephone Company, Jefferson City Local No. 2, IBEW	2/27/53	4/2/53
(7)	1953	(Wild cat)	Laclede Gas Company Local 8-109, Oil, Chemical & Atomic Workers International Union	3/23/53	3/24/53
(8)	1953	432	St. Louis Public Service Company Div. 788—Amal. Assn. of St. Elec. Rlwy. and Mtr. Coach Employees	7/1/53	7/2/53
(9)	1953	451	Southwestern Bell Telephone Co. Communications Workers of America	8/20/53	8/21/53
(10)	1953	359	Kansas City Power & Light Company Local 1464, IBEW	9/18/53	9/22/53
(11)	1954	505	Transcontinental Bus System, Inc., Continental Central Lines Brotherhood of Railroad Trainmen	7/5/54	10/7/54
(12)	1954	511	Kansas City Power & Light Company Local 1013, IBEW (Clerical Employees)	7/22/54	7/22/54
(13)	1955	563	Missouri Water Company District 50, UMWA	3/23/55	3/25/55
(14)	1955	516	Laclede Gas Company Local 8-6, Oil, Chemical & Atomic Workers	5/13/55	5/15/55
(15)	1957	744	Pemiscot-Dunklin Electric Cooperative Hayti Local 702, IBEW	12/21/57	12/21/57
(16)	1958	778	Union Electric Company Local 1439, IBEW	3/11/58	3/12/58
(17)	1960	885	Laclede Gas Company Local 8-194, Oil, Chemical & Atomic Workers International Union	6/30/60	7/2/60
(18)	1960	886	Laclede Gas Company Local 8-6, Oil Chemical & Atomic Workers International Union	6/30/60	7/2/60
(19)	1961	926	Gas Service Company Local 781, Gas Workers Metal Trades Union	6/7/61	7/29/61
(20)	1961	958	Gas Service Company, District 50, UMWA Region 50	11/1/61	1/10/61
(21)	1962	960	Crawford Electric Cooperative Inc., Local No. 2, IBEW, Bourbon	2/5/62	2/12/62

The Governor did not make a finding in any of the foregoing twenty-one strikes that the public interest, health and welfare was jeopardized. There was, therefore, no seizure in any of the cases.

Respectfully submitted,

MISSOURI STATE BOARD OF MEDICATION

/s/ Daniel C. Rogers, May 16, 1962

Daniel C. Rogers

Chairman

[fol. 282]

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, Respondent,

49377 vs. Appeal from the Circuit Court of Jackson County

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA: LOREN HARGUS, PEARL R. FINCH, JAMES L. GRIMES, LORRAIN B. FIRKINS, JAMES SMIRL, DELBERT H. LORD, VICTOR H. STUEVE, EARNEST E. O'NEILL, WM. V. MITCHELL, OLIVER D. PACE, EDWARD J. ARENS, LEWIS A. COPPLE, LESTER F. PARKER, JAMES T. STROHM, DONALD RIGBY and VINCENT ANNELLO, each individually as an officer of DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, et al., Appellants.

JUDGMENT—October 8, 1962

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered be modified so that the trial court retains jurisdiction of the cause, and as modified, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellants costs and charges herein expended and have therefor execution. (Opinion filed).

[fol. 283]

[File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

EX BANC

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed October 18, 1962

I. Notice is hereby given that Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Loren Hargus, Pearl B. Finch, James L. Grimes, Lorrain B. Firkins, James Smirl, Delbert H. Lord, Victor H. Stueve, Earnest E. O'Neill, Wm. V. Mitchell, Oliver D. Pace, Edward J. Arens, Lewis A. Copple, Lester F. Parker, James T. Strohm, Donald Higby, Vincent Annelle, Wm. K. Boland, Frank E. Brown, Herbert Lee Brown, A. F. Clark, Kenneth B. Hood, Carroll R. Lollard, Loyd A. Dailey, Earl Thomas Denyer, Joseph M. Eitel, Harold L. Ellis, James Clifford Fisher, Robert Lee Fravel, Robert Donald Goforth, John G. Hall, and Orville George Halley hereby appeal to the Supreme Court [fol. 284] of the United States from the final judgment of the Supreme Court of Missouri, en banc, entered in this action on October 8, 1962, affirming as modified the decree of the Circuit Court of Jackson County, Kansas City, Missouri.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. The transcript of proceedings before the Circuit Court of Jackson County, Missouri, at Kansas City, transmitted on the appeal to the Supreme Court of Missouri, including the following:

1. Petition for injunction.
2. Temporary restraining order.

3. Motion to dismiss.
4. Transcript of testimony taken at the trial and statement of counsel at the conclusion of the trial.
5. Defendant's exhibits 1 through 12.
6. Judgment entry of November 28, 1961.
7. Stipulation filed December 22, 1961.
8. Decree entered February 12, 1962.
9. Notice of appeal filed February 21, 1962.
10. Stipulation as to exhibits.
11. Approval of transcript.
12. Answer of defendants.

B. The entire transcript of proceedings before the Supreme Court of Missouri, including the following:

1. Appellants' alternative motion (1) to summarily affirm the judgment, or (2) to expedite the appeal by submitting the appeal on briefs without oral argument.

[fol. 285] 2. Suggestions of respondent with reference to appellants' alternative motion.

3. Suggestions of Gage, Hodges, Moore, Park & Kreamer as amicus curiae in respect of appellants' motion to summarily affirm the judgment.

4. Suggestions of Spencer, Fane, Britt & Browne in opposition to appellants' motion for summary affirmance.

5. Order of Supreme Court of Missouri of April 9, 1962 ruling upon appellants' alternative motion.

6. Motion of Spencer, Fane, Britt & Browne to suspend the rules, to require filing of a supplemental brief, and to allow appropriate time for responsive briefs.

7. Motion of appellants to strike motion of amici curiae to suspend the rules, or, in the alternative, to deny amici's motion.

8. Suggestions in opposition to motion to strike.

9. Order of Supreme Court of Missouri ruling on motion to suspend rules.

C. The opinion of the Supreme Court of Missouri filed October 8, 1962.

D. The judgment of the Supreme Court of Missouri filed October 8, 1962.

E. This notice of appeal.

F. The clerk will also please certify, for transmission to and lodging with the Clerk of the Supreme Court of the United States, one copy each of the briefs filed with the Supreme Court of Missouri by appellants, respondent, amici curiae Gage, Hodges, Moore, Park & Kreamer, and amici curiae Spencer, Fane, Britt & Browne, and the letter dated May 28, 1962, of Bernard Dunau, counsel for appellants, filed in lieu of a reply brief.

[fol. 286] III. The following questions are presented by this appeal:

A. Whether a Missouri statute known as the King-Thompson Act (Ch. 295, Rev. Stat. Mo., 1949), which provides a special type of compulsory fact-finding procedure applicable to labor disputes in public utilities and which makes "unlawful" "any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state . . . , as a means of enforcing any demands against the utility or against the state," is in conflict with and preempted by the Labor Management Relations Act, 1947.

B. Whether the King-Thompson Act, by prohibiting a public utility strike without substituting a compensating equivalent for it, offends substantive due process in violation of the Fourteenth Amendment of the United States Constitution and imposes involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution.

C. Whether the King-Thompson Act, by making it "unlawful" to "incite" or "support" a "strike or concerted refusal to work for any utility" after it "has been taken

over by the state," abridges free speech in violation of the Fourteenth Amendment of the United States Constitution as it incorporates the First Amendment and is void for vagueness in violation of the Fourteenth Amendment of the United States Constitution.

John Manning, 3333 Warwick Boulevard, Kansas City, Missouri.

Bernard Cushman, 5025 Wisconsin Avenue, N.W., Washington, D.C.

Bernard Dunau, 912 Dupont Circle Building, Washington 6, D.C.

Attorneys for Appellants.

[fol. 287] Proof of Service (omitted in printing).

[fol. 288] Clerk's Certificate (omitted in printing).

[fol. 289]

SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—

January 14, 1963

Appeal from the Supreme Court of the State of Missouri.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

January 14, 1963

Office Supreme Court, U.S.
FILED

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. **604**

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF
STREET, ELECTRIC RAILWAY AND MOTOR COACH
EMPLOYEES OF AMERICA, ET AL., *Appellants*

STATE OF MISSOURI, *Appellee*

On Appeal From the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

BERNARD CUSHMAN
5025 Wisconsin Avenue, N. W.
Washington, D. C.

BERNARD DUNAU
912 Dupont Circle Building
Washington 6, D. C.

JOHN MANNING
3333 Warwick Boulevard
Kansas City, Missouri

Attorneys for Appellants

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

No.

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF
STREET, ELECTRIC RAILWAY AND MOTOR COACH
EMPLOYEES OF AMERICA, ET AL., *Appellants*

v.

STATE OF MISSOURI, *Appellee*

On Appeal From the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the Supreme Court of Missouri, en banc, entered on October 8, 1962, affirming as modified the decree of the Circuit Court of Jackson County, Kansas City, Missouri.

OPINIONS BELOW

The opinion of the Missouri Supreme Court is not yet reported (*infra*, pp. 3a-42a). No opinion was written by the Circuit Court of Jackson County. The opinion of a three-judge federal district court in a proceeding pertaining to the same controversy as the instant one, expressing that court's decision to abstain from adjudication of the federal questions presented on this appeal in deference to initial state determination, is not yet reported (*infra*, pp. 45a-54a).

JURISDICTION

The Missouri Supreme Court affirmed as modified an injunction issued by the Circuit Court of Jackson County restraining a strike in a proceeding brought in accordance with the procedure prescribed by a Missouri statute known as the King-Thompson Act. The final judgment of the Missouri Supreme Court was entered on October 8, 1962 (R. 282). Notice of appeal was filed in that court on October 18, 1962 (R. 283). The jurisdiction of this Court to review by appeal the judgment of the Missouri Supreme Court is conferred by 28 U.S.C. § 1257(2).

STATUTES INVOLVED

The King-Thompson Act (Ch. 295, Rev. Stat. Mo., 1949) is set out in full in Appendix D (*infra*, pp. 55a-65a). Relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 316, 29 U.S.C. § 141, *et seq.*) are set out in Appendix E (*infra*, pp. 66a-72a).

QUESTIONS PRESENTED

1. Whether the King-Thompson Act, which establishes a special type of compulsory fact-finding procedure applicable to labor disputes in privately owned public utilities and which makes "unlawful" "any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state. . . , as a means of enforcing any demands against the utility or against the state," is in conflict with and pre-empted by the Labor Management Relations Act, 1947.

2. Whether the King-Thompson Act, by prohibiting a public utility strike without substituting a compensating equivalent for it, offends substantive due process in violation of the Fourteenth Amendment of the United States Constitution and imposes involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution.

STATEMENT

After an impasse had been reached in collective bargaining negotiations between appellant Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America (herein called the Union) and Kansas City Transit, Inc. (herein called the Company), the transit employees voted to and went on strike to cause the employer to accede to their terms. Upon the basis of the threatened strike, the Governor of Missouri invoked the King-Thompson Act and took possession of the property of the Company; after the strike was called, an injunction to restrain its continuance was sought and obtained in accordance with the injunctive procedure of the King-Thompson Act. The federal

questions presented on this appeal were first raised in the Circuit Court of Jackson County by motion to dismiss (R. 12-18), in the answer (R. 200-201), and at the trial (R. 180), and were thereafter urged on appeal to the Missouri Supreme Court (Br. pp. 2, 12-46).¹ The underlying subsidiary facts, relevant to appellants' claim that the King-Thompson Aet is invalid on federal grounds, may be summarized as follows:

A. The Interstate Business of Kansas City Transit, Inc.

The Company is a Missouri corporation with its principal office and place of business at Kansas City, Missouri. It transports passengers by bus in the States of Kansas and Missouri. It operates under a certificate of convenience and necessity issued by the Public Service Commission of Missouri and a like certificate issued by the Kansas State Corporation Commission. (R. 20-21.)

The Company has "one line that operates exclusively in the State of Kansas; . . . certain lines that operate exclusively in the State of Missouri; and then the rest of the lines are interstate operating between both states" (R. 21). The Company's annual revenue received from the bus transportation of passengers approximates \$8,600,000 (R. 22). Of this sum, 77 percent is derived from transporting passengers wholly within the State of Missouri, 7 percent is derived from transporting passengers wholly within the State of Kansas, and 15 percent is derived from transporting passengers between Missouri and Kansas (R. 22). On

¹ "Br." refers to the brief filed by appellants in the court below. All briefs in the court below and a letter submitted in lieu of a reply brief have been certified by the clerk of the court below and transmitted to the clerk of this Court.

a normal work day the average number of passengers carried by the Company on the total system is about 150,000 (R. 22). Of this number, 115,000 travel exclusively within Missouri, 10,500 travel exclusively within Kansas, and 24,500 travel interstate between points in Kansas and Missouri (R. 24-25).

The total round trip route miles of the Company's passenger transit system are about 496 miles (R. 25). 415 of these route miles are located in Missouri, and 81 in Kansas (R. 25). Of the total round trip mileage of 496, 150 round trip miles constitute continuous interstate routes running between Kansas and Missouri, 330 round trip miles constitute routes running exclusively within Missouri, and one route of 16.78 round trip miles runs exclusively within Kansas (R. 26-28, 44). The Company owns 401 buses (R. 28). It operates 104 on the interstate routes, 234 on routes exclusively within Missouri, and eight on the route exclusively within Kansas (R. 28-29).

Of the Company's total employment of 950 persons, 817 are within the bargaining unit represented by the Union (R. 31, 45). Of the employees within the bargaining unit, 640 are bus drivers and 170 are maintenance employees (R. 28, 30); 665 live in Missouri and 150 in Kansas (R. 110). The bus drivers are part of the transportation department comprised of two divisions, both located in Kansas City, Missouri; the maintenance employees are part of the maintenance department, comprised of a garage and shop, each located in Kansas City, Missouri (R. 29-30). Whether the bus driver operates an interstate route, a Kansas route, or a Missouri route, he reports to work and begins his journey at one of the two divisions at Kansas City, Missouri (R. 29-30). Buses are not assigned to a par-

ticular route but operate interchangeably on all routes; maintenance of buses is similarly not segregated; a maintenance employee can work on any bus (R. 30-31).

The Company annually spends about \$1,450,000 for fuels, materials, and supplies (R. 34-35). Much of these have an extrastate origin (R. 35). All of the 401 buses owned by the Company were manufactured in states other than Kansas or Missouri and were delivered to the Company in Missouri from other states (R. 35-36).

The National Labor Relations Board has found, and the Company in the proceeding before the Board has admitted, that the Company "is engaged in commerce within the meaning of the National Labor Relations Act." *Kansas City Public Service Co.*, 47 NLRB 1, 2.

B. The Labor Dispute and the Prohibition of the Strike

The employees represented by the Union in collective bargaining consist basically of bus operators, mechanics, service men, and cleaners and janitors (R. 98). The National Labor Relations Board on February 19, 1943 certified the Union as the representative of these employees and others within a defined bargaining unit, and the Union has been their representative from that time (R. 98-99, def. ex. 4). The Company and the Union entered into their first collective bargaining agreement in 1943, and agreements between them have since existed (R. 99).

The most recent agreement was for a term from November 1, 1959 through October 31, 1961 (R. 100, def. ex. 5, p. 3). On August 15, 1961, the Company notified the Union of its desire to terminate the agreement (R. 101). On August 30, 1961, the Union noti-

filed the Company of its desire to negotiate changes in the agreement, and identified the changes it proposed (R. 100). The Union sent copies of its notification to the Federal Mediation and Conciliation Service and to the Missouri State Board of Mediation (R. 101). On September 29, 1961, the Union filed a notice of dispute with the Federal Mediation and Conciliation Service, Missouri State Board of Mediation, and the Kansas Department of Labor (R. 101). The sixty-day notice of proposed changes sent to the Company and the thirty-day notice of dispute sent to the federal and state agencies were dispatched in accordance with the requirements of section 8(d)(1) and (3) of the Labor Management Relations Act, 1947.

Negotiations between the Company and the Union began on September 19, 1961 (R. 101). An impasse was reached about October 13, 1961 (R. 101-102). The subjects in dispute were wages, vacations with pay, group insurance, pensions, disability allowances, sick leave, a different system of work day for all maintenance employees, a profit sharing plan, a cost of living plan, and others (R. 102). On October 19, 1961, the Federal Mediation and Conciliation Service began to attempt to mediate the dispute and negotiations since then have been conducted with its assistance (R. 102).

On October 30, 1961, the Chairman of the Missouri State Board of Mediation attended the negotiation session scheduled for that day and he continued thereafter to sit in on the negotiations (R. 103, 72-73). On October 31, 1961, the Governor of Missouri wired the Union urging it to "accept the services of the full membership of the State Board of Mediation forthwith to hear the most important issues and make recommendations for settlement" (d.f. ex. 6). On

November 1, 1961, the Union wired its response, informing the Governor of its willingness to "accept the mediation efforts" of the state agency "provided that such efforts do not include hearings which result in recommendations" (def. ex. 7). On November 6, 1961, the Chairman of the State Board notified the Company and the Union of his intention to assemble the full Board, and on November 8, 1961, the Board convened (R. 103, 76-77). Orally and in writing, at the meeting of November 8, the Union stated that, as ground rules for a successful proceeding, the State Board should act in a mediatory capacity only, "without any hearing of a public nature" and without "recommendations, public or otherwise" (R. 103-105, 77-80, def. exs. 8, 9). The Union "has always felt that negotiations cannot be properly conducted in the newspapers or in the public" (R. 104). The State Board declined to commit itself to the method of proceeding requested by the Union, and the Union then withdrew from participation in the meeting of November 8 (R. 104-105, 77-80, def. exs. 8-9). Thereafter, on November 11, 1961, the State Board issued a public written recommendation for settlement, proposing a wage increase only, all other unresolved issues to be dropped (R. 81-83).

Meanwhile, on October 31 and November 1 and 2, an impasse having been reached in negotiations and the Company having refused to arbitrate the unsettled issues (R. 106, 76), the Union conducted a strike vote by secret ballot (R. 106). Of the 817 employees eligible to vote, 775 cast ballots, 681 voting for the strike, 74 against, and two ballots were blank (R. 106). The 42 who did not vote failed to do so because they "were home sick in bed or in the hospital or out of town on vacations" (R. 106).

Section 295.180 of the King-Thompson Act provides that the Governor of Missouri is authorized "to take immediate possession" of a public utility "after his investigation and proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of . . . a threatened or actual strike, . . . and that the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility. . . ." *Infra*, pp. 62a-63a. In accordance with this provision, on November 13, 1961, the Governor issued a proclamation that the threatened strike against the Company required him to exercise his authority to take possession of it in order to assure its operation (def. ex. 1). On the same date, the Governor issued Executive Order No. 1 stating that "I hereby take possession of the plants, equipment, and all facilities of the Kansas City Transit, Inc., located in the State of Missouri, for the use and operation by the State of Missouri in the public interest, effective at 11:59 o'clock, P.M., Central Standard Time, Monday, November 13, 1961" (def. ex. 2.) Still the same day, the Governor issued Executive Order No. 2, designating the Chairman of the Missouri State Board of Mediation as his agent to take possession (def. ex. 3). Section 295.200.1 of the King-Thompson Act makes "unlawful," after a utility has been "taken over," "any strike or concerted refusal to work . . . as a means of enforcing any demands against the utility or against the state." *Infra*, pp. 63a-64a.

At midnight November 13, 1961, the Union struck the Company and picketed its various premises (R. 106-107). The strike and picketing were discontinued in the evening of November 15, 1961, as a result of the

issuance by the Circuit Court of Jackson County, Missouri, of a temporary restraining order, continued in effect after trial pending final decision (R. 189); enjoining "any work stoppage, refusal to work and strike against the State of Missouri or Kansas City Transit, Inc." (R. 10, 107). During its continuance the strike and picketing had been peaceful (R. 107).

On two occasions previous to 1961, the Governor of Missouri, pursuant to the King-Thompson Act, took possession of the Company as a result of a threatened strike by the Union (R. 108-109). The period of seizure on the first occasion lasted from April 1950 to December 11, 1950, and on the second from November 6, 1957 to March 6, 1958 (R. 109). No actual strike occurred at either previous time after possession was taken (R. 109-110).

C. The Character of the Possession of the Company Taken by the State of Missouri

Possession of the Company consisted of the performance of no acts other than the delivery to its President of the Governor's Proclamation and Executive Orders No. 1 and 2 (R. 56-57). Executive Order No. 2 provides in part that "All rules and regulations of the aforesaid utility governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of Missouri" (def. ex. 3).

The employees of the Company are not, and will not be, employees of Missouri (R. 57, 92-97). The employees are not paid by Missouri; Missouri does not contribute to their social security or unemployment compensation benefits; Missouri does not pay their

workmen's compensation claims (R. 58-60). These payments are made by the Company (*ibid.*). Missouri does not direct the employees as to what to do or where to report for work (R. 61-62); it does not hire, discharge, or discipline them (R. 62); it does not control any aspect of the employment relationship or consult with the Company concerning it (R. 62).

Missouri does not and is not authorized to expend any of the Company's money (R. 61-62). Missouri does not possess the Company's bank accounts, sign its checks, or collect its revenue (R. 63-64). No reports are made to Missouri, and none have been requested, concerning the Company's receipt of its funds (R. 64). Missouri does not make purchases for the Company or pay its bills (R. 64-65). No property of the Company was actually conveyed, transferred, or otherwise turned over to Missouri (R. 65).

Missouri does not participate in the management of the Company; Missouri is not consulted by the Company's Board of Directors or officers as to the conduct of the business (R. 65-66). Management of the Company remains exclusively with its officers and Board of Directors (R. 66). There has been no change of any kind in the conduct of the business by the Company (R. 66-67).

D. The Character of the Actual and Apprehended Jeopardy to the "Public Interest, Health and Welfare" as a Result of the Strike Against the Company

During the two-day strike, the Mayor of Kansas City, Missouri, called for group riding in private cars (R. 160), and maximum occupancy of taxicabs (R. 162). Most people got to work (R. 150). The judgment of responsible police officials on the flow of traffic

was that "We had a few problems as we usually do but they were straightened out quickly. We had traffic supervisors in the field all over the city watching the situation. They reported that everything seemed to be moving smoothly. The principal tie-ups occurred again briefly in the vicinity of 31st and Main Streets and at 31st and The Paseo but we had enough men assigned to those areas that we got things moving quickly. We kept extra traffic patrolmen on duty" (R. 178-179).

In answer to the question, "Would you say, sir, that the primary economic effect [of a transit strike] would be upon retail sales in the downtown area of Kansas City?" (R. 167), the Mayor of Kansas City, Missouri, replied (R. 168):

That is definitely correct. It would be advantageous to shopping centers; it would certainly hurt the hard core of the city which is known as downtown Kansas City, our large stores doing a retail business. I do not think that a transit strike would in anyway affect distribution or wholesale in any fashion, only in minor ways. [See also, R. 124-125, 126-127, 129-134, 139.]

The Mayor further stated that "Police stations would continue to operate; hospitals would continue to operate; fire stations would continue to operate . . ." (R. 168-169). Approximately normal functioning of public utilities like light, gas, and telephone could be expected (R. 169). And the Mayor concluded that industrial plants, barring inconvenience, would operate substantially normally (R. 169).

**E. The Injunction Issued by the Circuit Court and Its
Affirmance by the Missouri Supreme Court**

The petition for injunction was filed with the Circuit Court of Jackson County on November 15, 1962 (R. 1-9). The temporary restraining order enjoining the continuance of the strike was entered the same day (R. 9-10). Trial of the prayer for a temporary injunction was set for November 27, 1962 (R. 10), and on that day appellants filed their motion to dismiss (R. 12-18). Trial was held on November 27 and 28 (R. 12, 96). On November 28, the temporary restraining order was continued in effect pending further order (R. 189). On December 7, appellants filed their answer (R. 198-201). On December 22, the parties stipulated that the evidence received at the preceding trial "may be considered by the court on both the temporary and permanent injunction" (R. 191). On February 12, 1962, the Circuit Court entered its decree adjudging that appellants "be . . . permanently enjoined and restrained from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri" (R. 192). On appeal the Missouri Supreme Court on October 8, 1962 adjudged that the decree "be modified so that the trial court retains jurisdiction of the cause, and as modified, be in all things affirmed, and stand in full force and effect . . ." (R. 282; *infra*, p. 1a).²

² Not sought or suggested by the parties or *amici curiae*, the court below *sua sponte* modified the judgment to state "that the trial court retains jurisdiction of the cause. . . ." Retention of jurisdiction by the trial court was ordered "so that it may modify its decree with changing facts and conditions . . ." (*infra*, p. 42a). The court below stated that, upon a showing that changed circumstances had eliminated the "emergency," appellants could apply to the Governor of Missouri to release the utility from seizure and apply to the trial court to modify the judgment if the Governor

THE QUESTIONS ARE SUBSTANTIAL

1. The question whether the King-Thompson Act conflicts with and is preempted by the Labor Management Relations Act, 1947, was before this Court in *Local No. 8-6, Oil, Chemical & Atomic Workers Union v. Missouri*, 361 U.S. 363. The Court in that case did not reach the merits of the question because it concluded that the controversy had been mooted. In dissenting from this disposition, Mr. Chief Justice Warren, Mr. Justice Black, and Mr. Justice Brennan stated that the "wrongfulness in holding the case moot is emphasized by our belief that the state court was plainly without any jurisdiction over this controversy unless this Court wants to overrule *Amalgamated Association S.E.R.M.C.E. v. Wisconsin Employment Relations Board*, 340 U.S. 383, and adopt the views of the three

denied relief (*infra*, pp. 31a-32a, 33a). Retention of jurisdiction for this purpose of course does not detract from the finality of the judgment. "Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted." *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 298. Explicit retention of jurisdiction for this purpose is common. *System Federation v. Wright*, 364 U.S. 642. Retention of jurisdiction by courts "for future modifications of their decrees . . . has . . . not been considered inconsistent with the finality of the original decrees." *Brown Shoe Co. v. United States*, 370 U.S. 294, 307, n. 14; see also, *St. Louis, Iron Mountain & So. Ry. Co. v. Southern Express Co.*, 108 U.S. 24; cf. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70, n. 3. Were the inherent limitation upon the permanence of any injunction operating in *future* to deprive the injunction of its status as a final judgment, every permanent state injunction would be unappealable to this Court, a manifestly untenable conclusion. In this case the federal questions "have reached a definitive stop" (*Republic Natural Gas Co. v. Oklahoma*; 334 U.S. 62, 71); as the case comes here, "the federal question is the controlling question; 'there is nothing more to be decided'". *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382.

dissenters in that case. We would follow that holding and reverse this case on the merits." 361 U.S. at 372.

The King-Thompson Act was passed in 1947. During the fifteen years since its enactment seizure has been invoked nine times to bar employees of public utilities from striking to enforce their demands in collective bargaining (*infra*, p. 43a). Throughout this time all negotiations involving public utility employees have been conducted by their unions under the disability of the pervasive threat of seizure precluding recourse to a strike. And, throughout this time, to say the least, grave doubt as to the validity of this actual or apprehended exertion of state power has existed as the opinion of the Chief Justice and Justices Black and Brennan signifies. It is indispensable that all concerned with the enforcement of the King-Thompson Act—the public utility employees, the employers for whom they work, the unions which represent them, and the public—finally know whether their affairs are being ordered in accordance with a valid enactment.

As the Chief Justice and Justices Black and Brennan state, the King-Thompson Act can stand only if this Court overrules *Amalgamated Association*. In *Amalgamated Association* this Court invalidated the Wisconsin Public Utility Anti-Strike Law because it conflicted with the Labor Management Relations Act, 1947. The Wisconsin Act made it "unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service" (§ 111.62). The same conflict which invalidated the Wisconsin Act nullifies the Missouri Act. Thus:

(a) Section 295.200 of the King-Thompson Act makes "unlawful" "any strike or concerted refusal to work for any utility or for the state after any plant, equipment, or facility has been taken over by the state . . . , as a means of enforcing any demands against the utility or against the state." The section could not more bluntly identify its point of conflict with the National Act. It prohibits a strike as a means of enforcing demands. As the Court said of the Wisconsin Act in *Amalgamated Association*, so it may be said with precise parity of the King-Thompson Act, "It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in industries covered by the Federal Act, has forbidden the exercise of rights protected by § 7 of the Federal Act." 340 U.S. at 398.

(b) The validity of the King-Thompson Act is not saved by labelling it "strictly emergency legislation. . . ." *Infra*, pp. 18a, 30a, 32a-33a; *Missouri v. Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 321. Appeal to the so-called emergency nature of the statute is based on the view that this Court left open this ground for exercising state authority in the utility field. It did not. In *Amalgamated Association* the validity of the Wisconsin Act was defended upon the following basis: In 1947 "Congress enacted special procedures to deal with strikes which might create national emergencies"; this shows a "congressional intent to carve out a separate field of 'emergency' labor disputes"; since "Congress acted only in respect to 'national emergencies,' . . . Congress intended, by silence, to leave the states free to regulate 'local emergency' disputes." 340 U.S. at 393-394. This Court rejected this argument on alternative grounds:

first, the Wisconsin Act is not "emergency" legislation, and, second, it would make no difference even if it were. As to the first ground the Court stated that (340 U.S. at 393-394):

However, the Wisconsin Act before us is not "emergency" legislation but a comprehensive code for the settlement of labor disputes between public-utility employers and employees. Far from being limited to "local emergencies," the act has been applied to disputes national in scope, and application of the act does not require the existence of an "emergency."

As to the second ground, the Court stated that (340 U.S. at 394):

In any event, congressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce. * * * And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with the federal law.

Thus this Court plainly held that an "emergency" caused by a strike does not justify state regulation of it. That this was an alternative ground for decision does not in the least detract from its authoritativeness. It is old law that "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.'" *United States v. Title Insurance & T. Co.*, 263 U.S. 472, 486. There can hardly

be a legal difference between a strike interrupting surface transportation in Milwaukee, as in *Amalgamated Association*, and a strike interrupting surface transportation in Kansas City, as in this case.

(c) Nor is the King-Thompson Act saved by the parallel plea that it "is not a comprehensive code for the settlement of labor disputes in utilities as the Wisconsin Act appeared to be." *Infra*, p. 18a; *Missouri v. Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 321. First of all, whether comprehensive or cursory, the state enactment falls if it conflicts with the National Act. In any event, the King-Thompson Act is not meaningfully less comprehensive than its Wisconsin counterpart. Its very declaration of policy asserts that "the state's regulation of labor relations affecting such public utilities is necessary in the public interest" (§ 295.010, *infra*, p. 55a). It imposes requirements with respect to the duration and renewal of collective bargaining agreements in public utilities (§§ 295.090, 295.100, *infra*, pp. 58a-59a). It provides penalties where the State Mediation Board has found "that any public utility has refused to bargain collectively in good faith with its employees over the terms and conditions of employment" (§ 295.200.5, *infra*, p. 64a). It requires that representatives "shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other" (§ 295.140, *infra*, p. 61a). And, most particularly, it establishes a special type of compulsory fact-finding procedure applicable to labor disputes in public utilities which itself conflicts with the National Act (§ 295.120, *infra*, p. 60a).

Thus, the essence of the federal scheme for mediation and conciliation is voluntarism—that the mediation

and conciliation methods employed shall be acceptable to the parties and not forced on them.³ The King-Thompson Act proceeds on an opposite tack. It provides for a "public hearing panel" (§ 295.120.1, *infra*, p. 60a); the panel is appointed and acts regardless of the wishes of the employer or the union or both not to designate members on it and not to participate in the hearing (§§ 295.120.2, 295.160, *infra*, pp. 60a, 61a-62a); the panel is to "hold and complete public hearings on the specific changes so requested, to the contract, agreement or understanding"; and "the panel shall file with the governor, in writing, a report setting forth a statement of the controversy, a resume of the evidence submitted to it and its recommendations based thereon" (§ 295.150, *infra*, p. 61a).

Thus, in contrast to the voluntarism which underlies federal statutory mediation and conciliation, the King-Thompson Act is based on compulsory hearing and fact-finding plus recommendation of settlement terms. As the Court of Appeals for the First Circuit stated in invalidating a Massachusetts statute similarly based on an activist view of the role of mediation and conciliation, so here, the "obvious [state] statutory purpose is to coerce agreement by invoking official action to mold public opinion with respect to a labor dispute to the end of bringing the pressure of public opinion to bear to force a settlement. This is quite contrary to the na-

³ As explained by William E. Simkin, Director of the Federal Mediation and Conciliation Service, "It should be made clear at the outset that we do not and never have conceived of mediation as a decision-making process. Our sole reliance is on persuasion. We seek no powers other than the right and obligation to attempt to persuade. This concept obviously includes the right of any company or any union to decide against any particular suggestion that may be made." Simkin, *Role of Government in Collective Bargaining*, 50 LRR 126, 129 (1962).

tional policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at after 'good faith' bargaining between the parties. The conflict between the state and federal policy is obvious." *General Electric Co. v. Callahan*, 294 F. 2d 60, 67 (C.A. 1).

(d) A "main" difference identified to save the validity of the King-Thompson Act is that "the Wisconsin Act provided for compulsory arbitration while the King-Thompson Act does not." *Missouri v. Local No. 8-6; Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d, 309, 321; *infra*, p. 36a. But the absence of compulsory arbitration worsens the conflict with the National Act. Both statutes prohibit a utility strike and both therefore geld collective bargaining by depriving the union of the capacity to exert economic pressure to back its demands. The Wisconsin Act at least sought to rectify the imbalance it created by providing compulsory arbitration as a substitute for the strike. While this nullifies the freedom of the parties to work out the terms of their agreement for themselves, it does not subject the employees to the practical necessity of accepting the employer's terms for lack of means to induce him to yield more favorable conditions. And, as between terms impartially determined by a disinterested body and terms which an employer can unilaterally dictate because he can act without apprehension of a strike, the former more nearly harmonizes with the federal objective of "restoring equality of bargaining power between employers and employees" (LMRA, Title I, § 1, 14). And so, in prohibiting the strike without providing a compensating equivalent to substitute for it, the King-Thompson Act worsens the conflict with the National Act.

(e) The reason overridingly stressed to support the validity of the King-Thompson Act is that the strike is prohibited only in conjunction with possession of the utility by the State. *Infra*, pp. 27a-34a. Utilization of seizure to signal prohibition of the strike does not save the statute. Congress canvassed and rejected seizure as an appropriate regulatory method. ^

This Court settled the question in *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, when it held that the President had no constitutional power to seize the steel mills to avert a national emergency, and premised this conclusion in significant part on the fact that Congress in the Taft-Hartley Act had withheld seizure authority from the President even in national emergency strikes. Writing for the Court, Mr. Justice Black explained that (*id.* at 586):

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling-off periods. All this failing, unions were left free to strike after a secret vote by employees

as to whether they wished to accept their employers' final settlement offer.

In agreement, Mr. Justice Frankfurter observed that "Congress in 1947 was again called upon to consider whether governmental seizure should be used to avoid serious industrial shutdowns. Congress decided against conferring such power generally and in advance, without special Congressional enactment to meet each particular need" (*id.* at 598). As Mr. Justice Burton stated, "Collective bargaining, rather than governmental seizure, was to be relied upon." *Id.* at 657; see also *id.* at 639, n. 8 (Mr. Justice Jackson), *id.* at 662-666 (Mr. Justice Clark).

The power to seize which Congress withheld from the President to avert a national emergency it did not grant to a State Governor to avert a local emergency. No less than other short cuts to industrial peace, seizure "was rejected by Congress as being inconsistent with its policy in respect to enterprises covered by the federal Act, and not because of any desire to leave the states free to adopt it." *Amalgamated Association*, 340 U.S. at 395. As summarized by Senator Taft, the architect of the Labor Management Relations Act, 1947, upon whose views this Court strongly relied in *Amalgamated Association*, "We did not feel that we should put into law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining." 340 U.S. at 395, n. 21 (emphasis supplied).

The incompatibility of seizure with the National Act is especially apparent here. For seizure here is wholly token in character, involving nothing but paper

possession of the utility, and having as its consequence and objective nothing but prohibition of the strike (*supra*, pp. 10-11). As the court below itself explained on a previous occasion when the very utility presently involved was taken over by the State pursuant to the King-Thompson Act (*Rider v. Julian*, 365 Mo. 313, 282 S.W. 2d 484, 494-495 (1955)):

The possession which . . . [the Governor's agent] assumed was largely declaratory in nature. It was proclaimed by the governor and again by . . . [the agent] . . . but actually nothing was done about it. * * * The State's possession was not real or visible, nor was the transit company ousted from its "actual and continuous occupancy or exercise of full dominion" over its premises. * * *

It is apparent from the record, and we so hold, that possession of . . . [the Governor's agent] and the state was not intended to be and was not in fact actual possession. Insofar as the possession needs to be identified by name, it might be called a legal possession or a nominal and technical possession. It was more or less the assertion of the right to possession which did not, in this case, ripen into exclusive or actual possession.

In any event, whether nominal or real, seizure designed as an instrument for use in a labor dispute cannot be invoked compatibly with the National Act. When seizure is triggered by a strike, is aimed at stopping the strike, and has a duration limited by settlement of the labor dispute out of which the strike grows, the seizure to which the State resorts is a labor relations device in conflict with collective bargaining backed by the right to strike as guaranteed by federal law. This is forbidden to the State by the Supremacy Clause.

(f) As least three times since this Court's decision in *Amalgamated Association* bills have been introduced,

which Congress has by vote affirmatively refused to enact, designed to overrule that decision by amending the National Labor Relations Act to authorize state laws prohibiting or regulating strikes by public utility employees. Rejection by Congress took place in 1954,⁴ 1958,⁵ and 1959.⁶ Congress has thus ratified the rule of *Amalgamated Association* and again affirmed that public utility employees may not be subjected to state laws which deny or curtail the right to strike or to bargain collectively as guaranteed by federal law.⁷

⁴ S. 2650, 83d Cong., 2d Sess. (1954); recommendations of President Eisenhower in his message to Congress (H. R. Doc. No. 291, 83d Cong., 2d Sess., Jan. 11, 1954); Letter of President Eisenhower to Senator Smith of March 26, 1954 (see S. Rep. No. 1211, 83d Cong., 2d Sess., 8); S. Rep. No. 1211, 83d Cong., 2d Sess., 2, 3, 17, 18; 100 Cong. Rec. 5836, 5383, 6202.

⁵ S. 3692, 85th Cong., 2d Sess. (1958); Hearings before subcommittee of Senate Labor Committee, 85th Cong., 2d Sess., 465 ff, 1444 ff; 104 Cong. Rec. 9984-9995.

⁶ 105 Cong. Rec. 6733-6740.

⁷ The decree of the Circuit Court of Jackson County enjoined "the work stoppage, refusal to work and strike *against the State of Missouri*" (R. 192, emphasis supplied). Appeal was taken to the Missouri Supreme Court from that decree (R. 193), the only one in existence and the only one from which an appeal could be taken. Relying upon the terms of the decree prohibiting the strike "against the State of Missouri," and stating that appellants do not assert a right to strike against the State of Missouri, the court below seems to say that appellants have not taken issue with the single matter which the decree enjoins (*infra*, pp. 24a-25a, 34a).

This is the sheerest casuistry. The strike which was enjoined could be denominated a strike "against the State" only in the sense that the State had taken nominal possession of the utility. The injunction against the strike was valid only if the seizure upon which it was predicated was valid. And appellants could not at every stage have contested the validity of the seizure; and hence the validity of the injunction, more forcefully than they did. Appellants' motion to dismiss explicitly stated that "Section 295.180 of said Law [the King-Thompson Act], providing that a public utility may be seized on the terms and conditions therein

2. We have set forth the factors showing that federal law supersedes the King-Thompson Act at greater length than might ordinarily be appropriate for the

set forth is in conflict with the Labor-Management Relations Act, including but not limited to Section 7 and Section 13 thereof" (R. 15). Appellants' answer explicitly incorporated the grounds stated in the motion to dismiss (R. 201). At the trial, appellants adduced the evidence showing the token character of the seizure (*supra*, pp. 10-11), as appears on the face of the opinion of the court below (*infra*, pp. 19a-20a), a showing compatible only with an attack upon the validity of the seizure. On appeal, the token character of the seizure was set out at length by appellants (Br. pp. 8-9), the "Points Relied On" explicitly stated that "Utilization of the seizure device to prohibit a public utility strike does not save the validity of the state enactment" (Br. p. 14), and this point was thereafter elaborated beyond mistake (Br. pp. 32-34), as appears on the face of the opinion of the court below (*infra*, p. 38a). Upon examination of the full record of the state proceeding, the three-judge federal district court, in staying the proceeding before it involving this controversy, recognized that the "permanent injunction was granted [by the Circuit Court of Jackson County] in a judgment *upholding the seizure and enjoining the strike*" (*infra*, p. 47a, emphasis supplied); it decided to abstain in deference to initial determination by the Missouri Supreme Court, recognizing that on the appeal pending before that court the validity of the seizure and injunction had been put in issue and would be adjudicated (*infra*, pp. 45a-54a).

Candid recognition of the obvious thus compels the conclusion that the seizure and the injunction predicated on it are one and the same, and that an attack upon the seizure is indistinguishably an attack upon the injunction which takes its sole force and efficacy from the seizure. The court below cannot realistically treat the injunction as if it forbade a strike by governmental employees against the Government, nor tax appellants for declining to be drawn into a fight on that artificial battleground (*infra*, pp. 28a-29a). The transit employees in this case are plainly not the employees of "any State or political subdivision thereof." *Cf.*, *Amalgamated Association*, 340 U.S. at 398, n. 25. Notwithstanding seizure, they retain protection against discharge for union activity, the utility continues to be obliged to bargain with their union, and any questions of representation involving them are still determinable by the National Labor Relations Board. They are obviously not public employees in any genuine sense.

purpose of a Jurisdictional Statement. We have done so in the belief that this Court may wish to consider summary reversal of the judgment. Supersession of the King-Thompson Act was briefed and argued to this Court on the merits in *Local 8-6, Oil, Chemical & Atomic Workers Union v. Missouri*, 361 U.S. 363. In that case Mr. Chief Justice Warren, Mr. Justice Black, and Mr. Justice Brennan expressed their conviction that the King-Thompson Act could stand only if *Amalgamated Association* were overruled. No tenable distinctions relevant to displacement by paramount federal authority exist between the King-Thompson Act and the Wisconsin Public Utility Anti-Strike Law invalidated on conflict grounds in *Amalgamated Association*. Adherence to *Amalgamated Association* makes summary reversal of the judgment below appropriate.

If the judgment is not summarily reversed, but probable jurisdiction is noted, the Court should advance the case. This Court in *Local No. 8-6* decided that the state injunction becomes moot when it expires upon vacation of seizure. Vacation of seizure follows the settlement of the underlying economic dispute.⁸ Accordingly, appellants are in the dilemma that (a) settlement may quickly moot the state injunction and thereby deprive them of the power to contest the validity of the King-Thompson Act which is at the heart of this proceeding, (b) until there is a settlement the employees are required to work under the unimproved standards of employment presently prevailing which petitioners believe to be seriously inadequate,

⁸ Section 295.180 of the King-Thompson Act provides in part that the seized "utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable after the settlement of said labor dispute. . . ." *Infra*, p. 63a.

and (c) any settlement reached during seizure fails to "reflect the strength and bargaining power" of the employees acting as a group⁹ because they are disabled from withholding their labor in concert to support their economic demands. Expedition is therefore essential to minimize the pressure of the dilemma appellants face in their effort to vindicate their federal rights.

3. The King-Thompson Act offends substantive due process in violation of the Fourteenth Amendment of the United States Constitution. The vice stems from the statute's prohibition of a public utility strike without providing a compensating equivalent to substitute for the strike. The occasion for prohibition of the strike is seizure of the utility upon the Governor's determination that an actual or threatened strike jeopardizes the public interest, health and welfare. Barring superseding federal law or the independent operation of the Commerce Clause, one may grant a valid state interest in safeguarding the community from imminent jeopardy caused by interruption of utility services. But protection of that interest, if it can justify it at all (see *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522), can justify abolition of the strike only if a compensating equivalent is substituted for the strike. It can not justify relegation of the public utility worker to economic servility by depriving him of the right to strike and giving him nothing in place of it. As stated by Mr. Justice Brandeis, the legislature, "while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." Dissenting in *Duplex Printing Press Co. v. Deering*,

⁹ *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 338.

254 U.S. 443, 488, cited with approval, *U. A. W. v. W. E. R. B.*, 336 U.S. 245, 252, 259; *Thornhill v. Alabama*, 310 U.S. 88, 104. But a fatal defect in what Missouri has done is that it has not substituted "processes of justice." It has forbidden the fight, and left the field to the employer. A statute is arbitrary and capricious, and therefore unconstitutional, when it sacrifices the employees' interest in a fair wage and working conditions by depriving them, without any compensating equivalent, of their only effective weapon in the competition over the division of the joint product of capital and labor.

The same consideration shows the statute's imposition of involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution. For to prohibit utility employees from striking, without substituting a compensating equivalent for the strike, brings about precisely the situation where "the master can compel and the laborer cannot escape the obligation to go on," with the result that "there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." *Pollack v. Williams*, 322 U.S. 4, 17-18. In the industrial world of the twentieth century this is involuntary servitude. It is no answer to say that the statute does not prohibit the worker from quitting. He can quit only if there is other work he can find. And the employee with substantial service with the employer can quit only if he is willing to surrender his equity in his seniority and start from scratch with another enterprise. The freedom to quit is therefore hollow. The hard fact is that employees who are prohibited from striking are compelled by economic exi-

gency to stay on the job on the employer's terms. This is involuntary servitude in today's world.¹⁰

¹⁰ The court below states that appellants' claims based upon the Thirteenth and Fourteenth Amendments were not presented to the trial court (*infra*, pp. 39a-41a). The statement is spurious. In *Missouri v. Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309, the court below rejected the Fourteenth Amendment claim on the ground that the "only limitation upon an employees' strike or a company's lockout is if the public interest is endangered," so that the "King-Thompson Act does not abolish the right of utility employees to strike, but only subordinates the right to the public interest" (317 S.W. 2d at 321, 323); it rejected the Thirteenth Amendment claim on the ground that the King-Thompson Act "is directed against a strike or a concerted refusal to work and has nothing to do with one or more quitting work of their own volition" (*id.* at 325). In the present case, in the face of this prior ruling, appellants' motion to dismiss in the trial court *inter alia* assigned the Thirteenth and Fourteenth Amendments as grounds for the invalidity of the King-Thompson Act (R. 14-17). At the trial upon the preliminary injunction (later stipulated to constitute the trial upon the permanent injunction, R. 191), appellants' counsel in his concluding argument stated in part (R. 180):

If your Honor please, as of course Your Honor is aware, the Supreme Court of Missouri, in *State of Missouri versus Local No. 8-6, Oil, Chemical and Atomic Workers International Union* has passed for its purposes on the King-Thompson Act. It has ruled that the King-Thompson Act is not preempted by the Taft-Hartley Act. It has also ruled it is not vulnerable to attack on the 1st and 14th Amendment grounds. It would be pointless for us to argue to Your Honor in view of that decision that these questions are still open before you so on those questions I simply want to state we are preserving those points ~~we~~ do not argue them to Your Honor.

In their ~~answer~~ appellants averred *inter alia* that the King-Thompson Act "abridges federal rights conferred by the First, Thirteenth, and Fourteenth Amendments of the United States Constitution," and incorporated in the "answer all the allegations and grounds stated by them in their motion to dismiss" (R. 201). On appeal to the court below, appellants in their "Points Relied On" stated that "Prohibition of a public utility strike, without substituting a compensating equivalent for it, offends substantive due process"

CONCLUSION

For the reasons stated, the judgment should be summarily reversed on the authority of *Amalgamated Association S.E.R.M.C.E. v. Wisconsin Employment*

(Br. p. 15) and "results in involuntary servitude" (Br. p. 16), and these points were elaborated in detail (Br. pp. 41-46). In these circumstances the notion that the Thirteenth and Fourteenth Amendment claims were not properly presented is utterly untenable. A state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forth nonfederal grounds of decision which are without fair or substantial support. *Staub v. Barley*, 355 U.S. 313; *Konigsberg v. State Bar of California*, 353 U.S. 252, 254-258; *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 361.

The patent insubstantiality of the position is illustrated by the statement of the court below that, in the "Points Relied On" set out in the brief on appeal pertaining to "substantive due process," "No constitutional provision is cited by number" (*infra*, p. 39a). Yet, prior to the enumeration of the "Points Relied On," appellants' brief to the court below stated *inter alia* that "this brief is confined to showing that the King-Thompson Act is invalid upon the ground that (1) it is in conflict with and preempted by the Labor Management Relations Act, 1947, and that (2) it abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution" (Br. p. 12). Following the enumeration of the "Points Relied On," in the part of the brief dealing with denial of "substantive due process," the Fourteenth Amendment was cited by number three times (Br. pp. 41-44). Finally, in a brief confined to urging the invalidity of a state statute on federal grounds, it is to the last degree unimaginable that any state court of last resort would not know that a claim based on "substantive due process" invokes the Fourteenth Amendment of the United States Constitution.

Vindication of federal rights cannot be frustrated by tortured "resort to an arid ritual of meaningless form." *Staub v. Barley*, 355 U.S. 313, 320. In any event, despite the claimed procedural inadequacy of the presentation of the Thirteenth and Fourteenth Amendment claims, the court below nevertheless did in this case decide them adversely to appellants on the merits on the authority of its previous decision in *Missouri v. Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309 (*infra*, pp. 41a-42a).

Relations Board, 340 U.S. 383. In the alternative, probable jurisdiction should be noted and the case advanced.

Respectfully submitted,

BERNARD CUSHMAN
5025 Wisconsin Avenue, N. W.
Washington, D. C.

BERNARD DUNAU
912 Dupont Circle Building
Washington 6, D. C.

JOHN MANNING
3333 Warwick Boulevard
Kansas City, Missouri

Attorneys for Appellants

November, 1962.

APPENDIX A

Cir. Ct. No. 639507

No. 49377

IN THE SUPREME COURT OF MISSOURI

SEPTEMBER SESSION, 1902

STATE OF MISSOURI, *Respondent*,

vs.

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA; Loren Hargus, Pearl R. Finch, James L. Grimes, Lorrain B. Firkins, James Smirl, Delbert H. Lord, Victor H. Stueve, Earnest E. O'Neill, Wm. V. Mitchell, Oliver D. Pace, Edward J. Arens, Lewis A. Copple, Lester F. Parker, James T. Strohm, Donald Rigby and Vincent Annello, each individually as an officer of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, et al., *Appellants*.

Appeal from the Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court heru being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be modified so that the trial court retains jurisdiction of the cause, and as modified, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellants costs and charges herein expended and have therefor execution.

(Opinion filed)

STATE OF MISSOURI—SCT.

I, MARION SPICER, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1963, and on the 8th day of October, 1962, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this day of 1962.

Clerk.

APPENDIX B

IN THE SUPREME COURT OF MISSOURI

EN BANC

SEPTEMBER SESSION, 1962

No. 49377

STATE OF MISSOURI, *Respondent*,

VS.

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET,
ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF
AMERICA, ET AL., *Appellants*.

On Appeal from the Circuit Court of Jackson County.

Honorable J. Donald Murphy, *Judge*

Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, an unincorporated, voluntary association of persons with headquarters at 1913 Tracy Avenue in the City of Kansas City, Missouri, defendants in the above entitled cause in the Circuit Court of Jackson County, Missouri, have appealed from a decree and permanent injunction entered in said cause on February 12, 1962, in favor of the State of Missouri. The judgment in said cause concluded, as follows: "Now, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendants, and all of the persons to whom notice of this order of injunction may come, be and they are hereby permanently enjoined and restrained from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike *against the State of Missouri*." (Italics ours.) See Section 295.200, subsections (1) and (6) RSMo 1959. Appellants seek to reverse the judgment and obtain a declaration that the

King-Thompson Act, Chapter 295 RSMo 1959, under which the action was instituted, is unconstitutional and void in its entirety under the Federal Constitution, although only portions of the mentioned Act are before the Court for construction on this appeal.

The case was in equity and it was tried by the court without the aid of a jury. Under Supreme Court Rule 73.00(b), applicable in such cases, it is provided that "all fact issues upon which no specific findings are made shall be deemed found in accordance with the result reached."

The case presents the issue as to whether the police power of the State may be exercised in an emergency and pursuant to state statutes to take over and maintain the operation of the public transportation system of a great city when the public interest, health and welfare of the State is jeopardized as the result of the sudden interruption and discontinuance of such service by reason of a strike by the employees of the transportation company against their employer. Appellants concede this is the issue in that they say: "Appellants basic position is that, *irrespective of the existence or non-existence of jeopardy by state standards*, the state procedure itself is beyond the power of the State to impose, and appellants' fundamental objective is to be free from its applicability at all.

• • • In this posture, where the question goes to the validity of fastening the state procedure onto the litigant at all, existence of the power to act must first be decided." (Italics ours.)

The transportation company is not a party to this action. This suit was instituted by the State of Missouri against the defendants after the State had taken possession and control of the transportation facilities of the transportation company. The basis of the proceeding is that the employees of the Company by a concerted refusal to work for and under the supervision of the State, after the Company's equipment and transportation facilities had been taken over by the State, have violated the law of

the State. The State obtained a temporary restraining order, which was subsequently followed, after hearing, submission and argument, by a permanent injunction, and from this judgment the defendants, as stated, have appealed.

The petition was filed on November 15, 1961, pursuant to the provisions of certain state statutes referred to as the King-Thompson Act, Chapter 295 RSMo 1959. This Act is entitled "An Act to provide for the mediation of labor disputes in public utilities; to create a board of mediation and to provide for the qualifications, powers, duties, compensation of the members of such board; to provide for the seizure and operation of public utilities by the state in order to insure continuous operation, to provide for the enforcement of this act and to prescribe penalties for any violation of this act." The mentioned Act has been before this Court for consideration on several previous occasions. See *State ex rel. State Board of Mediation v. Pigg*, 362 Mo. 798, 244 S.W.2d 75; *State v. Local No. 8-6, Oil, Chemical & Atomic Workers International Union, AFL-CIO*, Mo. Sup., 317 S.W.2d 309, vacated by the United States Supreme Court on the ground that the controversy had become moot (80 S.Ct. 391, 361 U.S. 363); *Rider v. Julian*, 365 Mo. 313, 282 S.W.2d 484. In this connection also see 29 U.S.C.A., Chapter 7, Sec. 152(2) defining the term "employer" under the Federal Act *as not applying to a state*. Of course, there is no question that the Federal labor legislation, 29 U.S.C.A., Sec. 141, et seq., in question here, encompassing as it does all industries and utilities "affecting commerce," applies to a privately owned public utility whose business and activities are carried on wholly within a single state, as well as it does to those that operate interstate. *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197.

The essential provisions of the King-Thompson Act: here in controversy, are Secs. 295.010, 295.180 and

295.200(1) and (6) RSMo 1959. These sections are, in part, as follows: Section 295.010 "Labor relations affecting public utilities—state policy. It is hereby declared to be the policy of the state that heat, light, power, sanitation, transportation, communication, and water are *life essentials of the people*; that the possibility of labor strife in utilities operating under governmental franchise or permit or under governmental ownership and control is a threat to the welfare and health of the people; that utilities so operating are clothed with public interest;" (Italics ours.) A similar declaration of the public policy of this State is announced in the Public Service Commission Act by Sections 386.310, 386.570 and 386.580 RSMo 1959. Also see *State v. Local No. 8-6*, etc., *supra*, 317 S.W.2d 309, 316 (7, 8).

Section 295.180 RSMo 1959, in part, provides that "Should either the utility or its employees refuse to accept and abide by the recommendations made pursuant to the provisions of this chapter . . . or in the event that neither side has given notice to the other of an intention to seek a change in working conditions, and there occurs a lockout, strike or work stoppage which, in the opinion of the governor, *threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare*, then and in that case he is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest." (Italics ours.) (As we shall subsequently see, the Governor of the State acted under this provision of the statutes and took possession of that portion of the plant, equipment and transportation facilities of the Kansas City Transit, Inc., located exclusively in the State of Missouri.)

Section 295.200(1) RSMo 1959 provides: "It shall be unlawful for any person, employee, or representative as defined in this chapter to call, incite, support or participate in any strike or concerted refusal to work for

• • • the state after any plant, equipment or facility has been taken over by the state under this chapter, as means of enforcing any demands against the utility or against the state." (Italics ours.) This particular statute must be read and construed together with Section 295.210 of the same chapter, as follows: "No employee shall be required to render labor or service without his consent; nor shall anything in this chapter be construed to make the quitting of his labor or services by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent."

Section 295.200(6) RSMo 1959 further provides: "The courts of this state shall have power to enforce by injunction or other legal or equitable remedies any provision of this chapter or any rule or regulation prescribed by the governor hereunder."

As stated, the cause being in equity and having been tried before the court without the aid of a jury, we review the cause de novo and pursuant to Supreme Court Rule 73.01(d) providing, in part, that "The appellate court shall review the case upon both the law and the evidence as in suits of an equitable nature. The judgment shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Briefly, some of the facts shown by the record are that the Kansas City Transit, Inc., (hereinafter referred to as the Company) operates a transportation system for passengers by bus in the States of Kansas and Missouri. It operates under a Certificate of Convenience and Necessity issued by the Public Service Commission of Missouri and a like certificate issued by the Kansas State Corporation. The Company's annual revenue received from bus transportation is approximately \$8,600,000. Of this sum 77 per cent is derived from transporting pas-

passengers wholly within the State of Missouri, 7 per cent from transporting passengers wholly within the State of Kansas and 15 per cent for transporting passengers between Missouri and Kansas. On a normal work day the number of passengers carried by the Company on the total system is approximately 150,000 persons. Of this number 115,000 travel exclusively in Missouri, 10,500 exclusively in Kansas and 24,500 travel interstate between points in Kansas and Missouri. The Company owns 401 busses and operates 234 on routes exclusively within the State of Missouri. The Company employs 950 persons and 817 are within the bargaining unit represented by the defendant Union. Of the employees within the bargaining unit 640 are bus drivers and 170 are maintenance employees; 665 live in Missouri. The Company annually spends about \$1,450,000 for fuels, materials and supplies. All of the 401 busses owned by the Company were manufactured in states other than Kansas or Missouri and delivered to the Company in Missouri from other states. Prior to the difficulties in question here, the National Labor Relations Board had found that the Kansas City Transit, Inc. is engaged in commerce within the meaning of the National Labor Relations Act. Kansas City Public Service Co., 47 NLRB 1, 2. The NLRB has certified the Union as the representative of the employees within its bargaining unit and the most recent labor agreement was approved for a term from November 1, 1959 through October 31, 1960.

On August 15, 1961, the Company notified the Union of its desire to terminate the then existing agreement. On August 30, 1961, the Union notified the Company of its desire to negotiate changes in the agreement and identified the changes it proposed. The evidence shows the basic issues in dispute between the Union and the Company to be substantially as follows: "Wages, of course, were in dispute; vacations with pay; group insurance; pensions; disability allowances; sick leave; a

different system of work day for all maintenance employees; a profit sharing plan; a cost of living plan; . . . runs, for example, in transportation; minimum guarantees; extra man's guarantee; bonus for drivers who would go a full year without an avoidable accident." The Union sent copies of its desired changes to the Federal Mediation and Conciliation Service and to the Missouri State Board of Mediation.

As indicated, the sixty-days' notice of proposed changes was sent to the Company and the thirty-day notice of dispute was sent to the Federal and State agencies. See 29 U.S.C.A. 158(d)(1) and (3); "Sec. 8(d)(1) and (3) of the Labor Management Relations Act, 1947." On October 19, 1961, the Federal Mediation and Conciliation Service began an attempt to mediate the dispute, and negotiations, since then, have been conducted with its assistance. However, the Union refused to accept the mediation services of the Missouri State Board of Mediation upon that Board's refusal to confine its services strictly to mediation efforts and not to submit recommendations for settlement, nor to publicize its meetings, or permit the attendance of third persons at any meetings. Ultimately, the negotiations between the Company and the Union reached an impasse and the Company refused to arbitrate the unsettled issues. A secret strike vote was taken, with 681 members favoring a strike, and a strike against the Company became effective at midnight on November 13, 1961. Picket lines were immediately established and continued until the evening of November 15, 1961.

Prior to the strike the Federal Mediation and Conciliation Service had cooperated fully with the State agencies having similar duties, including the Missouri State Board of Mediation. When it appeared that a strike was imminent, effective at midnight on November 13, 1961, the Governor of the State of Missouri issued a Proclamation to the effect that the contemplated strike threatened to interrupt the mass transportation operations in Missouri of the Kan-

sas City Transit, Inc.; that after investigation, it was his opinion the public interest, health and welfare were jeopardized as the result of the impending interruption of the public transportation system *in the City of Kansas City, Missouri*, and it was necessary that he exercise the authority vested in him by Chapter 295, and particularly Section 295.180 RSMo 1959, to insure the operation *in Missouri* of the facilities of the Kansas City Transit, Inc., a public utility. On the same day the Governor of the State of Missouri issued his Executive Order in words and figures as follows:

"TO THE SECRETARY OF STATE:

"WHEREAS, there is a labor dispute existing between the Kansas City Transit, Inc., a public utility furnishing public passenger transportation service in the State of Missouri, and Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, recognized bargaining agent of certain of the employees of the Kansas City Transit, Inc.; and WHEREAS, as a result of such labor dispute there is a threatened strike on the part of the employees *in Missouri* of the Kansas City Transit, Inc., who are members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, which threatens the effective operation *in Missouri* of the Kansas City Transit, Inc., a public utility; and WHEREAS, in my opinion such threatened strike threatens to interrupt the operation *in Missouri* of the Kansas City Transit, Inc.; and WHEREAS, in my opinion *the public interest, health and welfare are jeopardized*; and WHEREAS, after investigation, I, JOHN M. DALTON, Governor of Missouri, by Executive Proclamation dated the 13th day of November, 1961, proclaimed:

"(1) That the continued operation of the Kansas City Transit, Inc., a public Utility, is threatened as the result of a labor dispute.

"(2) That interruption of the operation of the Kansas City Transit, Inc., a public utility, is threatened as the result of a threatened strike on the part of employees of the Kansas City Transit, Inc., who are members of Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America.

"(3) That the public interest, health and welfare are jeopardized as the result of the threatened interruption of the operation of such public utility.

"(4) That the exercise of the authority vested in me by Chapter 295, and particularly Section 295.180, of the Revised Statutes of Missouri, 1959, is necessary to insure the operation in Missouri of the Kansas City Transit, Inc., a public utility.

"Now, THEREFORE, I, JOHN M. DALTON, Governor of the State of Missouri, by virtue of the authority vested in me by Chapter 295, and particularly Section 295.180, of the Revised Statutes of Missouri, 1959, do hereby order as follows:

"I hereby take possession of the plants, equipment, and all facilities of the Kansas City Transit, Inc., *located in the State of Missouri, for the use and operation by the State of Missouri in the public interest*, effective at 11:59 o'clock P.M., Central Standard Time, Monday, November 13, 1961.

S/ JOHN M. DALTON
Governor."

(All italics ours.)

The order was duly served on the Kansas City Transit, Inc., as stated, and a further order, effective November 13, 1961, at 11:50 p.m., was promulgated, in part, as follows, to wit:

"(1) That Daniel C. Rogers, Chairman of the Missouri State Board of Mediation, acting as my agent, is hereby

authorized and directed to take possession of the plants, equipment and all facilities of the Kansas City Transit, Inc., in the State of Missouri or such parts of each of said plants, equipment and facilities as may be necessary for the purpose of carrying out the provisions of this Order, and to effect my Proclamation and Executive Order No. 1 declaring the public interest, health and welfare jeopardized, in order to insure that the said utility above mentioned is effectively operated in the interest of the people of this State to the end that they may have the benefit of necessary and essential public utility services.

"(2) Said Daniel C. Rogers shall exercise the aforesaid authority as my agent forthwith, and he shall continue to exercise the aforesaid authority as my agent until and unless otherwise directed by me.

"(3) All rules and regulations of the aforesaid utility governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of Missouri.

"(4) This Order shall take effect at 11:59 P.M., Central Standard Time, November 13, 1961.

"Done this 13th day of November, 1961.

S/ JOHN M. DALTON
Governor"

The record shows this was the third time that the plant, property and transportation facilities of the mentioned Company had been seized by the State of Missouri on account of a work stoppage by reason of a threatened strike by the employees against the Company. The dates of the previous seizures and the previous periods of operation by the State being, as follows: Seized April 29, 1950 and operated until December 11, 1950; seized November 6, 1957 and operated until March 6, 1958. Appendix A and Appendix B attached to respondent's brief show a record

of other seizures and the operations under the Act in Missouri.

As stated, the strike was to begin at midnight on November 13, 1961, and the Union struck the Company at that time. The contract had expired October 31, 1961. The seizure was declared effective as of one minute before the strike was to become effective (11:59 p.m.). Thus the strike had been called against the Company before seizure. Thereafter, the officers and members of defendant Union refused to operate the transportation facilities of the Company after its physical properties, plant and operating facilities were taken possession of and placed in the control of the State of Missouri. The strike previously called went into effect after seizure by the State and a concerted refusal to work for the State was supported and participated in by the defendants-appellants. As a result, no mass transportation was provided in the city and the present suit was instituted by the State on November 15, 1961, praying an injunction against the Union, its officers and members from continuing, inciting, supporting and participating in the work stoppage and refusal to work for and under the supervision of the State of Missouri in the operation of the mass transportation facilities of the Company. See Sections 295.200(1) and (6) and 295.210.

The petition charged that "such action on the part of the union and officers in calling, inciting, supporting and participating in said strike and concerted refusal to work for the State of Missouri" was unlawful under Chapter 295 RSMo 1959, and especially Section 295.200(1) thereof. We find it unnecessary to further review the detailed allegations and prayers of the State's petition for an injunction against the defendants, or to detail the provisions of the temporary restraining order and order to show cause, as entered on said date, nor do we find it necessary to review in detail the provisions of defendants' motion to dismiss the petition, or the detailed provisions of the

subsequent answer filed by the defendants on December 7, 1961.

Defendants' motion to dismiss plaintiff's petition, as filed November 27, 1961, in part, stated: "The defendants state that Chapter 295 Revised Statutes of Missouri, 1949, and especially Sections 295.180 and 295.200 of said Chapter 295 are unconstitutional and invalid and all actions taken thereunder by the Governor of Missouri and Daniel C. Rogers are unlawful, invalid and without any force or effect for the reasons herein set forth and are in derogation of the rights, privileges and immunities granted to all members of the defendant Amalgamated and guaranteed by the Constitution of the United States in Article I Section 8 and Article VI of said Constitution, and the Thirteenth and Fourteenth Amendments of the Constitution of the United States." The motion to dismiss was incorporated in the answer by reference. With reference to defendants' answer, it is sufficient to say that appellants' brief summarizes the grounds upon which the defendants defended the State's said action in the circuit court, as follows, to wit: "(a) The King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947. (b) The King-Thompson Act abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution. (c) As applied in this case, the King-Thompson Act (i) operates extraterritorially, and therefore conflicts with the constitutional requirement that a State confine its authority within its own borders; and (ii) directly regulates interstate commerce, and therefore offends the Commerce Clause of the United States Constitution independently of implementing legislation by Congress. [And] (d) The actual or threatened strike against the Company did not jeopardize the 'public interest, health and welfare' within the meaning of the King-Thompson Act."

In reference to point (d), supra, plaintiff's petition alleged "That upon taking possession of the plants, equip-

ment and facilities of the Company by John M. Dalton, Governor of the State of Missouri, the employees and defendants herein have continued the labor dispute aforesaid, and on November 14, 1961, said employees and defendants herein failed and refused, and still fail and refuse, to perform work or labor for and *on behalf of the State of Missouri* in the furnishing of the transportation services aforesaid through the plants, equipment and facilities of The Company to the patrons of said company and to the people generally in the state of Missouri; that thus and thereby has been caused an actual interruption of the operation of the transportation services, as aforesaid, of the public utility, Kansas City Transit, Inc.; that the interruption of the furnishing of such transportation services through the plants, equipment and facilities of The Company and the refusal of the employees to perform work and labor for and on behalf of the State of Missouri in the furnishing of such transportation service has jeopardized and threatened the public interest, health and welfare of the State of Missouri and of the inhabitants thereof."

(Italics ours.) The defendants' answer to plaintiff's petition contained among others, the following allegations: "It is specifically denied that any threatened or actual strike jeopardizes and/or threatens or jeopardizes and/or threatened the public interest, health and welfare of the State of Missouri and of the inhabitants thereof. . . .

Answering the allegations of paragraph 14, defendants aver that the employees have struck, and desire to strike, in furtherance of their collective bargaining demands made upon Kansas City Transit, Inc., and that defendants support and participate in such strike action. *Defendants deny that any such strike action is a strike against or a refusal to work for the state of Missouri.*"

In their brief filed in this Court appellants have further explained that " 'Grounds (a) and (b) have been heretofore decided adversely to appellants' position by this Court in *Missouri v. Local No. 8-6, Oil, Chemical & Atomic*

Workers Union, 317 S.W. 2d 309, vacated as moot, 361 U.S. 363. Grounds (c) and (d) are undetermined by and open under the latter decision. However, on the procedure to expedite the appeal sought by this motion, appellants would drop grounds (c) and (d) and confine their appeal to grounds (a) and (b). The expedited appeal would thus be limited to urging this Court to overrule its prior decision and would not urge reversal on grounds not comprehended by and considered in the prior decision. *In short, appellants on this procedure withdraw grounds (c) and (d) and urge only grounds (a) and (b).*" (Italics ours.) Appellants further point out that, after the appeal from the decree in this case had been taken, appellants alternatively moved this Court "either (1) to summarily affirm the judgment on the authority of this Court's decision in *Missouri v. Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309, vacated as moot, 361 U.S. 363, or (2) to expedite the appeal by submitting it on briefs without oral argument, briefs to be simultaneously served within thirty days from the date of the order granting the motion to expedite the appeal." In pursuance to said request this Court, on April 9, 1962, entered its order refusing to summarily affirm the judgment of February 12, 1962, but granted leave "to submit appeal on briefs without oral argument," which was done.

While this Court refused to summarily affirm the judgment of the trial court in this case on the written request of appellants on the authority of this Court's decision in *State of Missouri v. Local No. 8-6, etc., supra*, 317 S.W. 2d 309, vacated as moot by the United States Supreme Court in 80 S. Ct. 394, 361 U.S. 363, it does not necessarily follow that the opinion of this Court in that case, as reported in 317 S.W. 2d 309, does not still represent the views of the members of this Court under the particular facts presented by the record in that case; however, the Supreme Court of the United States refused to review the validity of the injunction judgment entered in that case on the

ground that *the injunction had expired by its own terms* and because of the uniform policy of that Court not to review a judgment, which if reversed, the court's action would be ineffectual for want of a subject matter on which it could operate. Although the judgment was vacated, as moot, it does not appear from the opinion vacating the judgment that the Supreme Court of the United States intended thereby to overrule the common law of this State, as evidenced by the cases cited at 317 S.W. 2d 309, 314- (2, 3) of the Court's opinion, or to substitute therefor any Federal common law contrary to that Court's holding in *Erie R.R. v. Tompkins*, 58 S. Ct. 817. Further, each case must be decided upon its own peculiar facts and upon the particular issues of law presented for decision, hence the opinion of this Court in *State v. Local No. 8-6*, etc., *supra*, is not necessarily controlling or decisive under the facts of the case at bar, and this Court properly refused to summarily affirm the present judgment on the basis of this Court's prior judgment in another case, which had been vacated by the United States Supreme Court as moot.

In a motion filed by the appellants in this Court on May 9, 1962, appellants further state: "Independently of the basis upon which the motion to expedite the appeal was made and granted, appellants on any procedure simply do not choose to present the jeopardy question. While appellants took issue with the reasonableness of the Governor's opinion before the Circuit Court, *that court decided the question adversely to appellants*. Appellants do not wish to pursue that point on appeal. *They acquiesce in respondent's position that the requisite jeopardy existed within the meaning of the King-Thompson Act.*" (Italics ours.) In a letter filed on June 5, 1962, in lieu of a reply brief, appellants (with reference to their counsel) state that "he could not more forcefully express than he did appellants' acquiescence in the existence of jeopardy within the meaning of the King-Thompson Act." (Italics ours.)

Appellants take this position regardless of the fact that this court has construed the King-Thompson Act as follows: "The King-Thompson Act is strictly emergency legislation and is not a comprehensive code for the settlement of labor disputes in utilities * * *. Emergency legislation is justified under the police powers. 16 C.J.S., Constitutional Law § 198, pp. 972-973. The purpose of seizure is the preservation of community life as encouraged and fostered by the state. The purpose of the Act is to protect its citizens against disaster." *State v. Local No. 8-6, etc.*, supra, 317 S.W. 2d 309, 321.

Appellants in their statement of facts have substantially ignored the issue of jeopardy by the selection and statement of certain favorable evidence appearing in the record and ignoring much of the unfavorable evidence with reference to conditions existing during the two days in which the defendants, by concerted action, refused to work and operate the mass transportation system under the supervision and control of the State. In any event, what did happen during those two days is not necessarily decisive of the issues presented by plaintiff's action. Section 295.180 RSMo 1959 authorizes the Governor to act, when a lockout, strike or work stoppage occurs " * * * which, in the opinion of the governor, threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare, * * * and in that case he is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest." The statute is not limited to what *has* happened, but includes what *may reasonably be expected to happen*. It has been suggested that the trial court might well have taken judicial notice of what could and would happen to the inhabitants of a metropolitan area consisting of some one million, one-hundred thousand persons upon the *sudden and total* discontinuance of 90 percent of the public mass transportation service of the city leaving more than 115,000 daily Missouri users of such

services without any adequate substitute for such transportation services. Courts may not assume ignorance of what everybody knows (*Elder v. Delcour*, 364 Mo. 835, 269 S.W. 2d 17, 19; *City of St. Louis v. Pope*, 344 Mo. 479, 126 S.W. 2d 1201, 1210); nevertheless, the record in this case fully supports the finding of the trial court on the issue mentioned. A court could well find from the record in this case that the further continuance of the concerted work stoppage by the defendants under the circumstances shown and the continued failure of the defendant to operate the mass transportation system of the city with the facilities and equipment of the transportation company, which had been taken over by the State and were under the supervision and control of the State, might well have resulted in extreme danger to the health, welfare and safety of the inhabitants of Kansas City, Missouri, and in unrest, general confusion, disorganization, excitement, tension, inability to reach places of work in the retail district of the city, reduction of employment and loss of wages by innocent victims of the strike, congestion of traffic, disruption of business, reduction and impairment of law-enforcement agencies and the creation of havoc, disaster and general chaos in the community. However, we need not further discuss *the issue of jeopardy to the community* within the meaning of the King-Thompson Act as construed by this Court, or the evidence upon which the trial court's finding was based, because that issue is now conceded by the appellants, as hereinbefore and hereinafter stated.

With reference to the *State's operation* of the transportation system, the defendants' evidence tended to show that the employees of the Company are not, and will not become, employees of the State of Missouri; that the employees are not paid by the State; that the State does not contribute to their social security or unemployment compensation benefits; that it does not pay their workmen's compensation claims, since these payments are made by the Company;

and that the State does not direct the employees as to what to do or where to report for work, nor does it hire, discharge or discipline them or control any aspect of the employment relationship between them and the Company or consult with the Company concerning it.

Defendants also offered evidence tending to show that the State does not and is not authorized to expend any of the Company's money; that the State does not possess the Company's bank account; that the State officers do not sign its checks or collect its revenue or make reports to the State; that no financial reports have been requested concerning the Company's receipt of its funds and the State does not make purchases of supplies for the Company nor pay its bills. Defendants also offered testimony that no property of the company was actually conveyed, transferred or otherwise turned over to the State of Missouri, except as is evidenced by the Governor's Proclamations and Orders which were served on the Company and that a State agent was designated to act under said orders. There was also evidence that the State does not participate in the management of the Company, except as stated, and that the State is not consulted by the Company's board of directors or officers as to the conduct of the Company's business. The management of the Company remains exclusively in its board of directors and there has been no change of any kind in the conduct of its business by the Company, since the Company was served with the Governors' orders and the subsequent Proclamations, including the designation of the State's agent and the orders that said agent "shall exercise the aforesaid authority as my agent forthwith, and he shall continue to exercise the aforesaid authority as my agent until and unless otherwise directed by me." The Governor's order also directed that "All rules and regulations of the aforesaid utility governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by

the State of Missouri." In this connection we must say that defendants' answer admits that on the 13th day of November, 1961, said John M. Dalton, Governor of Missouri, under and by virtue of the authority vested in him by the Constitution of Missouri and statutes thereof, including Section 295.180 RSMo 1959, did take immediate possession of the plant, equipment and facilities of the said Kansas City Transit, Inc., "except that defendants aver that the taking of possession was to insure continuance of operations in the State of Kansas in addition to the State of Missouri." Defendants also offered in evidence the several Executive Orders and Proclamations of the Governor, including the one appointing Daniel C. Rogers as the Governor's agent, as hereinbefore stated, and containing the related orders with reference thereto.

Assuming that the trial judge accepted and believed the testimony of the defendants' witnesses with reference to the State's operation of the utility, yet the trial court may further have believed and found that there was no other possible or reasonable manner by which the State could operate the transportation system in Kansas City and protect its citizens, and particularly those citizens who were not interested in or participating in the strike of the defendants against their employer; and that the transportation system was being operated by the State, with the utility as its agent, in order to make use of the internal organization and well-established regulations of the utility company. See *Rider v. Julian*, supra, 282 S.W. 2d 484, 494.

Before reviewing the issues presented on appeal, we must consider appellants' further statement that, although they defended this cause in the Circuit Court of Jackson County upon the ground that, "(c) As applied in this case, the King-Thompson Act (i) operates extraterritorially, and therefore conflicts with the constitutional requirement that a state confine its authority within its own borders; and (ii) directly regulates interstate commerce, and therefore offends the Commerce Clause of the United States Con-

stitution independently of implementing legislation by Congress", nevertheless the appellants on this appeal *now desire to withdraw and do withdraw from the Court's consideration said ground (c)*, one of the grounds upon which the cause was submitted in the circuit court and which issue was found against the defendants. In a motion to strike certain matters filed in this Court on May 9, 1962, appellants further stated their position, as follows: "Appellants are unaware of any procedure by which a party can be required against his will to put in issue on appeal a matter he chooses not to contest."

We recognize that appellate courts customarily review cases on appeal on the basis of the issues presented by the appellants. In this case, as stated, the issues in dispute are solely between the State of Missouri and certain employees, who are on strike against the Company, and who, by concerted action, refused to operate the transportation facilities of the Company, after such facilities were in the legal possession of and under the supervision and control of the State.

As stated, the Company is not a party to this action. The pleadings and issues presented in the trial court do not present a labor dispute for decision between the Union and the Company. The trial court did not attempt to assume jurisdiction of a labor controversy or dispute, nor to decide any labor issues between employer and employees. The Governor of the State did not attempt to take possession or control of any physical property or transportation facilities *outside* of the State of Missouri. No state statute involved in this proceeding purports to require or attempt to carry on an *interstate* operation. The decree appealed from only enjoins defendants from supporting and participating in the concerted work stoppage and strike against the *State of Missouri*.

Further, the record shows that there has been no attempt, either by Executive Order, pleadings, judgment or

acts in the instant case, to extend the jurisdiction of the State of Missouri into the State of Kansas. "A state may validly regulate activities, persons, and property within its jurisdiction, although extraterritorial repercussions ensue, provided such regulation is vital to the welfare of its inhabitants, as the propriety of regulation is determined by its focus on internal problems, not by the range of its influence." 81 C.J.S., p. 861, Sec. 3; *Pacific Coast Dairy v. Department of Agriculture of California*, 318 U.S. 285, 295. The State did not take possession or control of the Company's property, or of any of its facilities *in any state other than the State of Missouri*. The decree conforms to the record and appellants may properly abandon any objection to the trial court's ruling on any defense submitted by them and overruled by the court, such as the defense set out in subdivision (c), *supra*.

Before considering appellants' brief as filed in this Court, we call attention to Supreme Court Rule 83.05, which expressly provides that "The brief for appellant shall contain: (1) . . . (the grounds on which jurisdiction is invoked); (2) A fair and concise statement of the facts without argument; (3) The points relied on, *which shall show what actions or rulings of the Court are sought to be reviewed and wherein and why they are claimed to be erroneous*, with citation of authorities thereunder . . . (e) Points Relied On. The points relied on *shall briefly and concisely state what actions or rulings of the Court are claimed to be erroneous and briefly and concisely state why it is contended the Court was wrong in any action or ruling sought to be reviewed. Setting out only abstract statements of law without showing how they are related to any action or ruling of the Court is not a compliance with this rule.*" (Italics ours.)

Appellants' statement of facts in their brief violates this rule in that it is argumentative, emphasizes the facts favorable to appellants and omits many facts unfavorable to appellants. Further, appellants not only argued the facts

in the statement of facts, but also argued issues of law. An opinion of this Court is cited and quoted from at some length in appellants' statement of facts. The brief is also subject to further criticism in that, under "Points and Authorities," appellants do not mention or refer to *the judgment appealed from*, nor do appellants briefly or concisely state what actions or rulings of the trial court are claimed to be erroneous or why any particular designated action of the trial court was wrong.

The four points relied on for reversal are stated in the brief as follows: "I. The King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947 * * * II. Prohibition of a public utility strike, without substituting a compensating equivalent for it, offends substantive due process. * * * III. Prohibition of a public utility strike, without substituting a compensating equivalent for it, results in involuntary servitude. * * * IV. To forbid a person to 'incite' or 'support' a strike or refusal to work is unconstitutional for the dual and inter-locking reasons that it abridges free speech and has the vice of vagueness." Many of the subheadings under the respective main headings are abstract statements of law. Except for the fact that this case involves matters of great public importance, we should not hesitate to dismiss this appeal for the failure of appellants to comply with the rules of this Court governing the preparation and contents of appellants' briefs.

Appellants in their statement of facts say that their "brief is confined to showing that the King-Thompson Act is invalid upon the ground that (1) it is in conflict with and preempted by the Labor Management Relations Act, 1947, and that (2) it abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution"; however, under "Points Relied On" appellants have designated only the *four points* hereinbefore referred to. At no place in appellants' brief

do they claim they had the right to strike against the State and in their answer denied that they did so, yet *essentially that is what the judgment appealed from expressly enjoined*. Further, under "Points Relied On" there is no assignment that the trial court erred in entering the particular judgment and decree that the court did enter in this case.

After the petition for an injunction was filed, the appellants filed a motion to dismiss the petition and then offered evidence in support of it. See Supreme Court Rules 55.29, 55.31, 55.33. The motion to dismiss was in effect overruled, the temporary injunction was continued in effect, defendants' answer was then filed, evidence was heard and the judgment appealed from was entered. No motion for a new trial was filed, heard or ruled because not required by Supreme Court Rule 79.03. The appeal was, therefore, taken from the judgment on the merits and there is no assignment under Points and Authorities that the court erred in overruling appellants' motion to dismiss the petition, an assignment that would have presented an issue of law.

As stated, the first point relied on by appellants is that "The King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947." This assignment is *not* directed to what the trial court decided, but seeks an *advisory opinion* as to the validity of all of the provisions of a state act, including many matters not in issue in any manner in this case, nor decided by the trial court. *Whison v. Retirement Board of Police Retirement System of Kansas City, Mo. Sup., 343 S.W. 2d 25, 35*; *State of Missouri ex rel. Jenkins v. Bradley, Mo. Sup., 358 S.W. 2d 38, 39*. Judicial review will not be accorded questions which are not directly and necessarily involved in the particular legal situation presented on appeal. *Juengel v. City of Glendale, Mo. Sup., 161 S.W. 2d 408, 409(2)*; *Kansas City, Mo., v. Williams, 8 Cir. 205 F. 2d 47,*

51(3), certiorari denied 346 U.S. 826. Further, Supreme Court Rule 83.13(a) governing appeals expressly provides that "no allegations of error shall be considered in any civil appeal except such as have been presented to or expressly decided by the trial court." It will be noted that Point I is an attack upon the King-Thompson Act in its entirety. In effect, the point may be referred to as a "shot-gun approach" intended to abolish the Act "lock, stock and barrel," regardless of what issues were presented to and ruled by the trial court.

In making this assignment the appellants, of course, ignore the holding of this Court in *State ex rel. State Board of Mediation v. Pigg*, supra, 244 S.W. 2d 75, in which this Court held that certain provisions of the Act were *severable*, particularly those sections directly affecting the State Board of Mediation, its legal existence, powers and duties. 244 S.W. 2d 75, 79(7). The first eight sections of the King-Thompson Act, Secs. 295.010-295.080 RSMo-1959, V.A.M.S., declaring state policy, defining terms, creating the Board and defining its duties, powers and mediation services, were also held *not* to be in conflict with the Labor Management Relations Act, 1947, particularly in view of Secs. 202(c) and 203(b), 29 U.S.C.A. Secs. 172(c) and 173(b), which contemplate the existence of state boards and cooperation with them. 244 S.W. 2d 80(8,9). This ruling in the Pigg case was approved by this Court in *State v. Local No. 8-6, etc.*, supra, 317 S.W. 2d 309, 315(4), where it was further held that the sections considered and ruled in *State v. Local No. 8-6, etc.*, supra, were also *severable* from and could stand independently of the remainder of the Act, since the remaining sections of the Act were not before the Court for consideration in that case. 317 S.W. 2d 309, 323.

Further, the point relied on does *not* in any subhead thereunder direct attention to any particular section of the King-Thompson Act, although under subhead (f) Sections

295.010, 295.090, 295.100, 295.120, 295.150, 295.160 and 295.200.5 are cited, but these sections are not the sections presented to and ruled on by the trial judge. Appellants' first subpoint under Point I is that "The operations of the Company affect interstate commerce so as to bring its labor relations within the governance of the Labor Management Relations Act, 1947, and to subject it, its employees and the Union to the jurisdiction of the National Labor Relations Board." This abstract statement of law is not questioned by respondent at any place in the record and it is fully conceded by the Governor's Proclamation. Further, the appellants on this appeal have expressly waived any claim for reversal on the ground that the King-Thompson Act "directly regulates interstate commerce, and therefore offends the Commerce Clause of the United States Constitution."

In further support of appellants' first point it is contended that "The protective applicability of the national Act to strikes conducted by public utility employees cannot be displaced because of the public character of a utility and its historic amenability to control, the importance of uninterrupted utility services to the community, or the duty to render continuous service." No such issue was ruled by the judgment entered. It is further contended that the heart of the National Act is the right to engage in free and private collective bargaining backed by the right to strike; and that in prohibiting any "concerted refusal to work" for the state after any plant, equipment or facility has been taken over by the state, the King-Thompson Act is in irreconcilable conflict with the National Act because the King-Thompson Act "forbids peaceful strikes to enforce union demands for wages, hours and working conditions." No section of the King-Thompson Act prohibiting free and private collective bargaining or peaceful strikes to enforce union demands is cited in support of the last quoted statement; however, the Act does make *unlawful the concerted refusal to work for the State*

in the operation of the utility after any such plant, equipment or facility has been taken over by the State in an effort to protect the public by use of the police power of the State. Appellants expressly admit that the right to strike enjoys constitutional protection only "against unreasonable legislative prohibition or curtailment."

In consideration of the above arguments it must be kept in mind that employees of a public service corporation upon entering such service assume an implied obligation to perform their duties in such a manner as will enable the corporation to discharge its obligations to the public. 35 Am. Jur., Master and Servant, p. 514, Sec. 82. See also *Wilson v. New*, 243 U.S. 332, 353. The Public Service Commission law recognizes this and imposes penalties on employees as well as on utilities for their wrongful acts. Sec. 386.580 RSMo 1959. Further, employees in accepting employment by a public utility, *such as a utility operating mass transportation services in a great city*, must to some extent surrender certain rights and their employment is subject to the police power of the State in emergencies and when the operating properties are taken over by the State.

In the case of *United Public Workers of America, v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556, 567, in construing and upholding the Hatch Act, 18 U.S.C.A. §§ 61h and 61i, which declared unlawful certain specified political activities of Federal employees, the United States Supreme Court pointed out that fundamental human rights were not absolutes and that the "court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." A restriction against taking "any active part in political management or in political campaigns" was approved. Also, the acceptance of numerous other types of employment necessarily requires the surrender of what would otherwise constitute the invasion of personal rights as, for example, in the case of Fraternal Order of

Police v. Harris, 306 Mich. 68, 10 N.W. 2d 310, 312, where the court said: "Those who serve the public, either as the makers of the law, the interpreters of the law, or those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights." Restrictions upon the political activities of civil service employees of the City of St. Louis was upheld although attacked on constitutional grounds of interference with freedom of speech and the deprivation of property and liberty without due process of law. State ex inf. McKittrick, ex rel. Ham v. Kirby, 349 Mo. 988, 163 S.W. 2d 990; and see King v. Priest, 357 Mo. 68, 206 S.W. 2d 547, 556, appeal dismissed, 68 S. Ct. 736, rehearing denied 68 S. Ct. 901, where it was held that certain rules and regulations adopted by the Police Department of the City of St. Louis were not unconstitutional in denying appellants and other members of the police department the right of freedom of speech and freedom of assembly and petition contrary to the First Amendment and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States. Further, *in accepting employment with a company operating a mass transportation system in a great city of this State* the employees must be assumed to have done so in view of the State law governing the operation of such companies and providing for State operation in temporary emergencies to protect the public from disaster, and such law necessarily became a part of their contract of employment. See Metropolitan Life Ins. Co. v. Siebert, 72 F. 2d 6; Gray v. Metropolitan Life Ins. Co., Mo. App., 150 S.W. 2d 563, 564(4).

Appellants further argue that while a public utility strike may cause a local "emergency," judged by local standards, such an "emergency" does not justify state prohibition or curtailment of a strike by the employees of a utility against their employer. Again, appellants refuse to consider the issue decided by the court as evidenced by the judgment entered. The argument overlooks the fact

that the decree enjoined only the concerted refusal to work for and under the supervision of the State in the operation of the mass transportation system. The Act does not prohibit or curtail strikes by employees, absent an emergency jeopardizing the health, welfare and safety of the public sufficient to authorize and sustain the action of the Governor in taking possession and control of the physical properties, plant and transportation facilities of the employer-company against which the strike is directed. Even then judicial action is required to obtain enforcement. Further, the argument ignores appellants' admission of the existence of *jeopardy* under the provisions of the Act, as *construed by this Court*. The facts and admissions therefore bring this case *within the exceptions*, as stated, in that the issue is *not the regulation of any protected activity of a labor union* and no unfair labor practice is charged or shown. No issue, such as to picketing, peaceful or otherwise, is involved, nor was any such issue decided by the trial court. The issue is as to the right of the State *to protect the public in an emergency situation from disaster* resulting from disputes between employers and employees after state seizure of the physical properties.

A strike or lockout which jeopardizes the public health, safety and welfare is not a protected activity under the National Labor Management Relations Act, 1947. This Court in the case of *State v. Local No. 8-6, etc.*, supra, 317 S.W. 2d 309, 319(11) pointed out that the congressional declaration in Section 1(b) of the Act, 29 U.S.C.A., Sec. 141(b) clearly indicated a purpose to subordinate industrial strife to the public health, safety and welfare; and that consistent with the subordination of labor acts and practices which jeopardize the public interest, it is clear that Congress did not intend to remove any existing "limitations or qualifications" on the right to strike. The United States Supreme Court has in numerous cases, as set out in this Court's opinion (317 S.W. 2d 309, 319[11]), recognized that the violation of *local laws* enacted for the

preservation of property rights and personal safety are not protected by the Federal Act. It is there further pointed out that such holdings are consistent with the congressional intent as expressed in other acts where the exercise of the police power in local government is particularly suitable.

This Court also pointed out in *State v. Local No. 8-6*, etc., supra, 317 S.W. 2d 309, 321(13), that a growing number of decisions of the United States Supreme Court indicate a considerable area where state activity and regulation is permitted. The cases which support that conclusion are reviewed and considered in the mentioned opinion, 317 S.W. 2d 309, 321(13). The judgment in question here does not purport to deal with rights between the employer and the employees. It was entered after the State's seizure of the physical properties of the utility and it only enjoined the appellants "from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike *against the State of Missouri.*" (Italics ours.) Further, we cannot and do not construe the King-Thompson Act as making any provision for the *permanent operation* of a utility by the State after any such seizure. The Act as construed by the officials of this State in administering it show that the Governor may release the control of a utility's physical property at any time after seizure. (See Appendix A and Appendix B set out at the close of this opinion.) We find nothing in the Act to prevent appellants from making application to the Governor at any time for the release of the property of the utility upon reasonable notice and terms and any such release would relieve appellants from the particular judgment entered in this case. Further, as hereinafter mentioned, in the event of the denial of such relief appellants could apply to the trial court for a modification of the judgment theretofore entered.

While Section 295.180 RSMo 1959 provides that "when- ever such public utility, its plant, equipment or facility has

been or is hereafter so taken by reason of a strike, lockout, threatened strike, threatened lockout, work stoppage or slowdown, or other cause, such utility, plant, equipment or facility shall be returned to the owners thereof *as soon as practicable after the settlement of said labor dispute*, and it shall thereupon be the duty of such utility to continue the operation of the plant facility, or equipment in accordance with its franchise and certificate of public convenience and necessity" (italics ours), nevertheless there is no provision in the Act requiring state operation and control, until a settlement of the labor dispute has been reached, and we find no authority requiring us to so hold. Absent substantial evidence of the existence of an emergency threatening the public health, safety and welfare with impending disaster (as hereinbefore stated and previously held), state operation and control of the assets of a utility and a permanent injunction against concerted refusal to operate the utility's property cannot be sustained. Seizure and injunctive relief are provided only in emergency situations. We must and do construe the term "emergency" to imply a temporary situation and necessarily dependent upon the particular facts of the particular case under consideration. Nor can we construe the Act as authorizing a *permanent injunction* prohibiting defendants from striking against either the Company or the State and, therefore, the court should have retained jurisdiction of the cause, so that the equitable relief granted might be modified in accordance with changing conditions.

As stated, the right of the Union to engage in a peaceful strike against the utility is not denied by the Act, except by the limitations which are imposed during emergency situations and only after state seizure; however, the decree appealed from does not deny the right of appellants to strike against the Company, and that issue was not decided by the court. In the case of *State v. Local No. 8-6*, etc., supra, 317 S.W. 2d 309, 321, this Court, as stated, said: "The King-Thompson Act is strictly emergency legisla-

tion and is not a comprehensive code for the settlement of labor disputes in utilities as the Wisconsin Act appeared to be. Emergency legislation is justified under the police powers. . . . The purpose of seizure is the preservation of community life as encouraged and fostered by the state. The purpose of the Act is to protect its citizens against disaster. As previously indicated, we deem the strike in the circumstances in this case to be unlawful Clearly the Legislature did not intend that disaster conditions to the public and the creation of emergency situations endangering the health, safety and welfare of the general public should be used for the purpose of obtaining the settlement of even peaceful strikes.

There is no contention here by the State, nor has this Court held that the total stoppage of the mass transportation system in Kansas City, after reasonable notice and an opportunity to the public to adjust to such a situation, would create a *permanent emergency situation* entitling the State to a permanent injunction against a concerted stoppage of work, or authorizing the State to indefinitely operate the transportation system on the theory of protecting the citizens *from disaster in an emergency situation*. Nor does this Court expect to so hold. However, in this case, jeopardy to the public, within the meaning of the provisions of the Act and as construed by this Court, is now admitted by appellants to have existed at the time of the seizure and the entering of the judgment appealed from.

If the emergency situation no longer in fact exists, appellants may apply to the court for a modification of the decree on terms, since it is not this Court's purpose or intention to hold that the mere total discontinuance of mass transportation services in Kansas City, Missouri, after reasonable notice to the public will necessarily create such an emergency or evidence such an impending disaster to public health, safety and welfare as to justify permanent injunctive relief under the King-Thompson Act.

In their printed argument the appellants undertake to support their attack upon the entire King-Thompson Act, as being in conflict with and pre-empted by the Labor Management Relations Act, by citing Section 295.200 RSMo 1959 and by stating that it "prohibits a strike as a means of enforcing demands", however, defendants do not claim *the right to strike against the State* and in their answer to plaintiff's petition *they expressly denied that they did strike against the State*, although the fact that, by concerted action, they refused to operate the mass transportation system under the State's supervision and control, until the injunction decree was entered, is not disputed.

Appellants make numerous arguments and contentions with reference to the invalidity of the King-Thompson Act considered as a whole, as stated, under Point I of their "Points Relied On." However, the Act, considered as a whole, is not before the Court for consideration, nor was it before the trial court, nor was its validity as a whole considered or ruled. Appellants are limited to a consideration of the judgment entered, which specific judgment they have elected to ignore in their brief. It will be unnecessary to review in detail the subpoints set out in appellants' brief, since appellants' attack on all sections of the King-Thompson Act is primarily based upon the decision of the Supreme Court in the case of *Amalgamated Ass'n of St., Elec. Ry. & Mtr. Coach Employees of America, Div. 998, et al., v. Wisconsin Employment Relations Board*, 340 U.S. 383.

Before considering that case in some detail perhaps we should say that experienced lawyers and competent judges have long since ceased to accept, as legal authority, mere casual statements in the opinion of any court, particularly where such statements are unrelated to the facts and issues presented for decision. Mere obiter, or a speech by the writer of an opinion, must not be confused with the deci-

sion of the court based upon the facts shown by the record and by the legal issues presented to and decided by the court.

A mere casual examination of the Wisconsin Act, which was considered in the Amal. Ass'n case (Wisc. Statute 1949, Sec. 111.50 to 111.63), shows that the similarities between the Wisconsin Act and the King-Thompson Act, Chapter 295 RSMo 1959, are very superficial, while *the differences are fundamental*. These differences clearly appear from even a casual examination of the opinion of Chief Justice Vinson in the Amal. Ass'n case, from which opinion we shall quote at some length. These fundamental differences are shown, as follows, in the Amal. Ass'n opinion. The court said, "Whenever such an 'impasse' occurs, the Wisconsin Employment Relations Board is empowered to appoint a conciliator to meet with the parties in an effort to settle the dispute. * * * In the event of a failure of conciliation, the Board is directed to select arbitrators *who shall 'hear and determine' the dispute.* * * * In summary, the act *substitutes arbitration upon order of the Board for collective bargaining* whenever an impasse is reached in the bargaining process. And, to insure conformity with the statutory scheme, Wisconsin *denies to utility employees the right to strike.* (340 U.S. 383, l. c. 388) * * * However, the Wisconsin Act before us is *not 'emergency' legislation but a comprehensive code for the settlement of labor disputes between public-utility employers and employees.* Far from being limited to 'local emergencies,' the act has been applied to disputes national in scope, and application of the act does not require the existence of an 'emergency.' (l.c. 393-394) * * * And, where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law. (l.c. 394) * * * Michigan, in O'Brien, sought to impose conditions on the right to strike

and now Wisconsin seeks to abrogate that right altogether insofar as petitioners are concerned. (l.c. 395-396) . . . Congress knew full well that its labor legislation 'pre-empt~~s~~ the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation. *Fifth*. It would be sufficient to state that the Wisconsin Act, *in forbidding peaceful strikes for higher wages* in industries covered by the Federal Act, *has forbidden the exercise of rights protected by § 7 of the Federal Act.*" (l.c. 397-398) (Italics and local citations ours.)

After pointing out further specific conflicts between the Wisconsin Act and the policies of the National Act the opinion concludes: "Having found that the Wisconsin Public Utility Anti-Strike Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand." (l.c. 399.)

The King-Thompson Act is so *fundamentally different* from the Wisconsin Act that the mentioned case does not apply and further the judgment appealed from in this case is so totally different from the Wisconsin judgment, which was reversed, that the Wisconsin case could not apply and is not controlling.

The King-Thompson Act makes no provision for arbitrators who shall hear and finally *determine* labor *disputes*, nor does the King-Thompson Act deny to utility employees the right to strike. No issue as to compulsory arbitration is presented on this record. The Act does provide for the safety of the public in the event of a strike and the Governor's finding of emergency and for judicial proceeding after the State has taken possession of the utility's

property. There is no provision in the King-Thompson Act purporting to provide for concurrent *state regulation* of peaceful strikes for higher wages. In any event that is not the issue in this case. Further, the King-Thompson Act has been held by the highest court in Missouri to be emergency legislation; and that "The purpose of seizure is the preservation of community life as encouraged and fostered by the State. The purpose of the Act is to protect its citizens against disaster." 317 S.W. 2d 309, 321. Appellants have failed to point out wherein by the King-Thompson Act "the State seeks to deny *entirely* a federally guaranteed right," (italics ours) or wherein the Act has been applied to "disputes national in scope." No section of the King-Thompson Act seeks to abrogate the right of employees to strike against their employers, prior to the state's seizure of the utility, and the judgment here does not mention the employer. The employer-employee relationship is not the subject matter of the action. Further, we find no provision of the National Labor Relations Act *authorizing* a strike against the state, and the Federal legislation in question does not pre-empt the right of the State to obtain the decree in question here.

Further, it is well settled that the exercise of the police power of a state is superseded only where the repugnance or conflict with a Federal act is so direct and positive that the two acts cannot be reconciled. *United Const. Workers, Affiliated with United Mine Workers of America v. Laburnum Construction Corp.*, 347 U.S. 656; *Breard v. City of Alexandria*, 341 U.S. 622. As stated by Mr. Chief Justice Hughes in *Kelly v. State of Washington*, 302 U.S. 1, 10: "The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" And see *State v. Local 8-6, etc., supra*, 317 S.W. 2d 309, 321.

It would unduly extend this opinion to review and distinguish the many cases relied upon by appellants to obtain the reversal of the present judgment. Perhaps a few other cases than the Wisconsin case should be referred to. Appellants cite the case of *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, and say that "Seizure is the particular technique employed by the King-Thompson Act to signal the prohibition of a utility strike"; that "the Supreme Court settled the question . . . when it held that the President had no constitutional power to seize the steel mills to avert a national emergency, and premised this conclusion in significant part on the fact that Congress in the Taft-Hartley Act had withheld seizure authority from the President even in national emergency strikes"; and that "the power to seize which Congress withheld from the President to avert a national emergency it did not grant to a State Governor to avert a local emergency." In making the above arguments, the appellants overlook the fact that the Governor of Missouri acted upon legislative authority granted by the State Legislature under the police power of the State; and that the decree appealed from by appellants was entered after notice and a hearing in a judicial proceeding.

Appellants also cite *Weber, et al., v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480, where, in a dispute between two unions over work being performed for their employer, each claiming the work for its own members, one union went on a strike and the employer filed with the National Labor Relations Board a charge of an unfair labor practice under Section 8(b)(4)(D) of the Taft-Hartley Act against the striking union, but the Board held that no "dispute" existed within the meaning of that subsection and quashed the notice of a hearing. The employer then filed a complaint in a Missouri state court alleging violation of other subsections of the Taft-Hartley Act and also a violation of the State's restraint of trade statute. The state court enjoined the strike as a restraint of trade, but the United

States Supreme Court held that the state court was without jurisdiction to enjoin the conduct of the union since its jurisdiction had been pre-empted by authority vested in the National Labor Relations Board with reference to unfair labor practices. It will be noted that that case was instituted in the state court by the employer for an injunction to restrain picketing of the plant by defendants (employees) on the ground that it was in furtherance of an unlawful conspiracy and in restraint of trade. In other words, the action was between the employer and the employee, while in the case now before this Court the employer, Kansas City Transit, Inc., is not even a party to the record, which is wholly between the State of Missouri and the defendants-appellants, and no unfair labor practices are involved. Other cases cited by appellants are also easily distinguishable from the present proceeding.

Appellants also argue that the failure of the Senate of the 86th Congress to approve the Holland Amendment and the previous rejection by Congress of certain other proposals must be construed as supporting appellants' construction of certain cases *previously* decided by the Supreme Court. We do not consider the cases relied upon to be controlling in this case, nor do we consider the rejection of the various mentioned proposals to be of any significance. We find no merit in appellants' Point I of their brief insofar as it applies to any issue presented to and decided by the trial court in this proceeding.

Under Point II appellants say that "prohibition of a public utility strike, *without substituting a compensating equivalent for it*, offends substantive due process." The assignment is an abstract statement of law, not directed to the judgment appealed from and it does not comply with the rules of this Court as a proper assignment. No constitutional provision is cited by number. The right to strike is not in question in this case as "the right to strike" is generally understood, to wit, against a private employer.

Appellants further argue that "To prohibit public utility employees from striking cripples their ability through collective bargaining to induce their employer to grant satisfactory terms and effectively compels them to work under terms unilaterally dictated by the employer." Again, that issue is not before the court for consideration, since the appeal is from *a particular judgment which does not concern the right of public utility employees to strike against their employer* and there is nothing in the King-Thompson Act to prevent peaceful strikes where public safety is not endangered. *The King-Thompson Act deals with the protection of the public, after such a strike has been called or has been put into effect and after public safety, health and welfare is sufficiently endangered to require the State to be concerned with the operation of the utility and has been taken possession of its physical property and seeks to operate the utility under its supervision to prevent public disaster.*

It is further argued that "A statute is arbitrary and capricious . . . when it sacrifices the employees' interest in a fair wage and working conditions by depriving them, without any compensating equivalent, of the right to strike, their only effective weapon in the competition over the division of the joint product of capital and labor." Again, *that is not the issue presented by the appeal from the judgment* and, for that matter, the particular assignment that "Prohibition of a public utility strike, *without substituting a compensating equivalent for it*; offends substantive due process" (italics ours) was not an issue presented to or decided by the trial court and hence it is not for review here, nor does any provision of the King-Thompson Act, as stated, contain any provision prohibiting public utility employees from striking against their private employer, except that under the present judgment they are enjoined from striking against the State during state operation of the utility.

As stated, the third assignment under Points and Authorities in appellants' brief is that "Prohibition of a public utility strike, *without substituting a compensating equivalent for it*, results in involuntary servitude." Appellants argue that the provision of the King-Thompson Act prohibiting concerted refusal to work for or to *strike against the State*, after the State, in an emergency to protect its people under the police power, has taken possession of a strike-bound utility, imposes involuntary servitude. This argument ignores and fails to give consideration to Section 295.210 RSMo 1959, the closing provision of the King-Thompson Act. We find nothing in the record presented on appeal to show that either Point II or III in the form presented here was directly presented to or passed upon by the trial court, or that either point was impliedly ruled by the judgment entered. However, we approve the reasoning and ruling of this Court on somewhat similar issues in *State v. Local No. 8-6, etc., supra*, 317 S.W. 2d 309, 325(22).

Appellants' fourth point, as stated, is that "To forbid a person to 'incite' or 'support' a strike or refusal to work is unconstitutional for the dual and interlocking reasons that it abridges free speech and has the vice of vagueness." This contention, like the two previous ones, is not directed to the *particular decision* as made by the court under the particular facts of this case, and again appellants seek an advisory opinion upon hypothetical issues which were not ruled and decided. Clearly there is nothing in the decree as entered that interferes in any way with employees' expressions of distaste for the employer's practices insofar as they relate to their relationship to the private employer, the utility or transportation company. Appellants' argument assumes that the decree is directed to a strike against the Company rather than a concerted refusal to operate the mass transportation system under state control.

Further, with reference to the issues attempted to be raised by appellants' Points II, III and IV, perhaps we

should say that, while in the closing portion of what appellants call a "Statement of Facts", the appellants say that their "brief is confined to showing that the King-Thompson Act is invalid upon the ground (1) that it is in conflict with and preempted by the Labor Management Relations Act, 1947, and (2) that it abridges federal rights conferred by the First, Thirteenth and Fourteenth Amendments of the United States Constitution," yet these latter issues are not properly presented for decision under Points and Authorities. As stated, the last three assignments do not comply with the rules of this Court governing appellate briefs. All of the assignments are, however, in effect, more or less directed to alleged *violations by the decree* of appellants' alleged rights under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States. It is sufficient to say that, substantially, the same issues were raised and arguments made with reference to this same King-Thompson Act in the case of *State v. Local No. 8-6*, etc., *supra*; and that said issues were therein ruled adversely to appellants' contentions, as may be noted by reference to the report of that case in 317 S.W. 2d 309, 324(19), 325(22), and this Court again approves the rulings in said opinion with reference to said issues, although said issues are not properly raised and presented for decision in this case and are not before this Court for decision at this time.

As hereinbefore indicated, the judgment entered is modified so that the trial court retains jurisdiction of the cause, so that it may modify its decree in accordance with changing facts and conditions as hereinbefore indicated. As modified the judgment is affirmed and the cause is remanded.

S. P. DALTON, Judge.

APPENDIX A

THE FOLLOWING INFORMATION ON 9 SEIZURES UNDER THE KING-THOMPSON ACT
WAS COMPILED FROM THE RECORDS OF THE MISSOURI STATE BOARD OF
MEDIATION, JEFFERSON CITY, MISSOURI

Year	Case No.	Style of Case	Contract Expired	Strike Started	Seizure Started	Seizure Ended
1950	157	Kansas City Public Service Company, Div. 1287, Amal. Assn. of St. Elec. Rlwy. and Mtr. Coach Emp. of America	12/31/49	4/29/50	4/29/50	12/11/50
1950	164	St. Louis Public Service Company, Local 788, Amal. Assn. of St. Elec. Rlwy. and Mtr. Coach Emp. of America	12/31/49	8/10/50	8/10/50	10/19/50
1955	560	St. Louis Public Service Co., Div. 788, Amal. Assn. of St. Elec. Rlwy. and Mtr. Coach Emp. of America	2/28/55	10/10/55	10/11/55	11/23/55
1956	645	Laclede Gas Company Local 8-194, Oil, Chemical and Atomic Workers Int'l. Union	6/30/56	7/ 1/56	7/ 5/56	10/31/56
	546	Laclede Gas Company Local 8-6, Oil, Chemical and Atomic Workers Int'l. Union				
	647	Laclede Gas Company, Local 8-109, Oil, Chemical and Atomic Workers Int'l. Union				
1956	650	Kansas City Power & Light Company, Local 412, IBEW	6/30/56	7/ 5/56	7/ 6/56	7/17/56
	651	Kansas City Power & Light Company, Local 1464, IBEW				
	652	Kansas City Power & Light Company, Local 1613, IBEW				
1957	708	Kansas City Power and Light Company, Local 1464, IBEW	6/30/57	8/26/57	8/31/57	6/25/58
	709	Kansas City Power and Light Company, Local 412, IBEW				
	710	Kansas City Power and Light Company, Local 1613, IBEW				
1957	737	Kansas City Public Service Company, Div. 1287, Amal. Assn. of St. Elec., Rlwy., and Mtr. Coach Emp. of America	10/31/57	11/ 6/57	11/ 6/57	3/ 6/58
1960	889	Kansas City Power and Light Company, Local 1464, IBEW	6/30/60	7/12/60	8/ 5/60	5/31/61
1961	957	Kansas City Transit (formerly Public Service Company) Div. 1287, Amal. Assn.	10/31/61	11/13/61	11/13/61	still under seizure

Respectfully submitted,

MISSOURI STATE BOARD OF MEDIATION

/s/ DANIEL C. ROGERS

May 16, 1962

Daniel C. Rogers

Chairman

APPENDIX B

NON-SEIZURE CASES UNDER THE KING-THOMPSON ACT

No.	Year	Case No.	Style of Case	Strike Started	Strike Ended
(1)	1948	24	Associated Highway Carriers In. Local No. 41—Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Kansas City)	3/8/48	3/14/48
(2)	1952	267	Southwestern Bell Telephone Co. Communications Workers of America Division 20	3/6/52	3/10/52
(3)	1952	280	Capital City Telephone Company Local No. 2, IBEW	3/23/52	4/2/52
(4)	1952	367	Motor Carriers Council of St. Louis, Local 600, District 9, Teamsters, Chauffeurs', Warehousemen & Helpers of America (St. Louis)	6/30/52	8/2/52
(5)	1952	293	Grundy Electric Coop., Inc., Local No. 53, IBEW	8/29/52	8/31/52
(6)	1953	418	Capital City Telephone Company, Jefferson City Local No. 2, IBEW	2/27/53	4/2/53
(7)	1953	(Wild cat) 432	Laclede Gas Company, Local 8-109, Oil, Chemical & Atomic Workers International Union	3/23/53	3/24/53
(8)	1953	432	St. Louis Public Service Company Div. 788—Amal. Assn. of St. Louis Rlwy. and Mtr. Coach Employees	7/1/53	7/2/53
(9)	1953	451	Southwestern Bell Telephone Co., Communications Workers of America	8/20/53	8/21/53
(10)	1953	359	Kansas City Power & Light Company Local 1464, IBEW	9/18/53	9/22/53
(11)	1954	505	Transcontinental Bus System, Inc., Continental Central Lines Brotherhood of Railroad Trainmen	7/5/54	10/7/54
(12)	1954	511	Kansas City Power & Light Company Local 1613, IBEW (Clerical Employees)	7/22/54	7/22/54
(13)	1955	563	Missouri Water Company District 50, UMWA	3/23/55	3/25/55
(14)	1955	516	Laclede Gas Company Local 8-6, Oil, Chemical & Atomic Workers	5/13/55	5/15/55
(15)	1957	744	Pemiscot-Dunklin Electric Cooperative Hyatt Local 702, IBEW	12/21/57	12/21/57
(16)	1958	778	Union Electric Company, Local 1439, IBEW	8/11/58	8/12/58
(17)	1960	885	Laclede Gas Company Local 8 194, Oil, Chemical & Atomic Workers International Union	6/30/60	7/2/60
(18)	1960	886	Laclede Gas Company Local 8-6, Oil, Chemical and Atomic Workers International Union	6/30/60	7/2/60
(19)	1961	926	Gas Service Company Local 781, Gas Workers Metal Trade Union	6/7/61	6/29/61
(20)	1961	958	Gas Service Company District 50, UMWA Region 55	11/1/61	11/10/61
(21)	1962	960	Crawford Electric Cooperative Inc., Local No. 2, IBEW-Bourbon	2/5/62	2/12/62

The Governor did not make a finding in any of the foregoing twenty-one strikes that the public interest, health and welfare was jeopardized. There was, therefore, no seizure in any of the cases:

Respectfully submitted,

MISSOURI STATE BOARD OF MEDIATION
/s/ DANIEL C. ROGERS May 18, 1962
Daniel C. Rogers
Chairman

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Filed June 22, 1962

Civil Action No. 784

DIVISION 1287, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO, *Plaintiff*,

v.

JOHN M. DALTON, GOVERNOR OF THE STATE OF MISSOURI,
STATE OF MISSOURI BOARD OF MEDIATION,
DANIEL C. ROGERS, INDIVIDUALLY AND AS CHAIRMAN OF THE
STATE OF MISSOURI BOARD OF MEDIATION,
CHARLES BIBBS, INDIVIDUALLY AND AS MEMBER OF THE STATE
OF MISSOURI BOARD OF MEDIATION,
ALBERT FULTS, INDIVIDUALLY AND AS MEMBER OF THE STATE
OF MISSOURI BOARD OF MEDIATION,
J. RAYMOND LAMBRIGHT, INDIVIDUALLY AND AS MEMBER OF
THE STATE OF MISSOURI BOARD OF MEDIATION, and
TRUMAN HENRY, INDIVIDUALLY AND AS MEMBER OF THE STATE
OF MISSOURI BOARD OF MEDIATION, *Defendants*.

Before RIDGE, *Circuit Judge*, and
DUNCAN and BECKER, *District Judges*

Memorandum—Opinion

BECKER, *District Judge*:

This is a suit brought by a mass transit employees' union for a restraining order, injunction and declaratory judgment against officials of the State of Missouri, involving the validity of Missouri's Public Utility Seizure

and Anti-Strike Law. This law, known as the King-Thompson Act, authorizes the Governor of Missouri to seize and operate a public utility affected by a work stoppage when, in his opinion, the public interest, health, and welfare are jeopardized.

Pending Legal Actions in Federal and State Courts

On November 14, 1961, the plaintiff Union filed this suit for declaratory judgment, restraining order, and for temporary and permanent injunctions, attacking the validity of the King-Thompson Act,¹ on the charge of conflict with the National Labor Relations Act² and on many separate charges of unconstitutionality.

On November 15, 1961, the State of Missouri filed in the Circuit Court of Jackson County a petition for a restraining order and injunction to enforce the no-strike provisions of the King-Thompson Act, securing an immediate temporary restraining order against continuance of the strike.

On November 27, the writer, acting as Judge of the United States District Court, denied the Union's motion

¹ The entire Act, Chapter 295, Revised Statutes of Missouri, 1959, §§ 295.010-295.210, inclusive. See *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 383, 71 S. Ct. 359, 95 L. ed. 364, 22 A.L.R. 2d 894, invalidating a Wisconsin Public Utility Anti-Strike Law which differs from the Missouri King-Thompson Act in that the Wisconsin Act (1) provided for compulsory arbitration, (2) did not provide for seizure and (3) was not limited to emergencies jeopardizing the public interest, health and welfare. Compare *State v. Local No. 8-6* (Mo. Sup. 1958) 317 S.W. 2d 309, *en banc*, judgment vacated as moot, *Local 8-6 v. Missouri*, 361 U.S. 363, 80 S. Ct. 391, 4 L. ed. 2d 373. There are other distinctions and perhaps real differences in the two acts. Shute, *A Survey of Missouri Labor Law*, Part VII, 18 Mo. L. Rev. 93, 1c. 154-192 (1953).

² 61 Stat. 316, Title 29, U.S.C. §§ 141-187, allegedly in violation of Section 8 of Article I and Article VI of the Constitution of the United States. This is the claim of "preemption."

for a temporary restraining order against the seizure and enforcement through state court suit of the King-Thompson Act. However, the Union's request to convene a Three-Judge Court to hear the Union's complaint was sustained.³ This Three-Judge Court was duly convened.

Judgment and Appeal in the State Court

The Circuit Court of Jackson County, on November 27 and 28, 1961, heard the state court suit on the merits. After evidence was heard, the temporary restraining order was continued in force. Finally, on February 12, 1962, a permanent injunction was granted in a judgment upholding the seizure and enjoining the strike.

An appeal from this judgment to the Missouri Supreme Court was taken by the Union. This appeal was submitted on briefs without oral argument to expedite its determination. There is every evidence that the Missouri courts are adjudicating the state court suit with unusual speed.

Issues in the State Court Suit

The Union concedes that it defended the state court suit for enforcement of the seizure and anti-strike provisions upon all grounds of preemption and unconstitutionality decided previously in *Local 8-6 v. State*⁴ and also on two additional grounds stated in its brief⁵ in the Supreme Court of Missouri, as follows:

³ Division 1287, *Amalgamated Association of Street, Electric Railway, and Motor Coach Employees of America, AFL-CIO v. Dalton*, . . . F. Supp. . . . (Not yet reported)

⁴ (Mo. Sup. 1958) 317 S.W. 2d 309, *en banc*, vacated as moot, 316 U.S. 363, 80 S. Ct. 391, 4 L. ed. 373.

⁵ Page 11, Brief for Appellants, Cause No. 49377 in the Supreme Court of Missouri, *en banc*. In the state trial court the points were argued by able counsel for the Union, in part as follows:

"If Your Honor please, as of course Your Honor is aware, the Supreme Court of Missouri, in *State of Missouri versus Local No.*

"(c) As applied in this case, the King-Thompson Act (i) operates extraterritorially, and therefore conflicts with the constitutional requirement that a state confine its authority within its own borders and (ii) directly regulates interstate commerce, and therefore

8-6. Oil, Chemical and Atomic Workers International Union has passed for its purposes on the King-Thompson Act. It has ruled that the King-Thompson Act is not pre-empted by the Taft-Hartley Act. It has also ruled it is not vulnerable to attack on the 1st and 14th Amendment grounds. It would be pointless for us to argue to Your Honor in view of that decision that these questions are still open before you so on those questions I simply want to state we are preserving those points but do not argue them to Your Honor.

"There are two additional points which in our view are not foreclosed by the decision of the Missouri Supreme Court and which we do address to Your Honor. The first is the question of the existence of a state of jeopardy to interest, health and safety within the meaning of the King-Thompson Act. In the decision of the Supreme Court of Missouri in the Oil, Chemical and Atomic Workers case, the Supreme Court noted as follows: 'It is quite clear that the patrons of Laclede Gas Company were not furnished with safe and adequate service after the strike began. The strike had been in progress for five days before the Governor exercised his emergency powers and it was four days later before the State filed suit. The evidence demonstrates conclusively that the public health, safety and interest was jeopardized and that the Governor had reasonable cause to take action.'

"In our view on the record in this case there was no reasonable cause to take action. All that the record establishes by way of jeopardy is that there would be a reduction in the retail sales in the downtown Missouri area. We hardly think that a reduction in the retail sales in the downtown Missouri area constitutes jeopardy to interest, health and safety within the meaning of the King-Thompson Act.

"I think that the point we want to make was epitomized in the testimony of Mr. Austin who stated that the \$5.00 sale of a tie you do not make today you do not make. That may be true, I rather doubt it, but whether or not you make it, you do not jeopardize interest, health and safety by not making that sale. That is all

offends the Commerce Clause of the United States Constitution independently of implementing legislation by Congress.

“(d) The actual or threatened strike against the Company did not jeopardize the ‘public interest, health and welfare’ within the meaning of the King-Thompson Act.”

In moving in the Supreme Court of Missouri for summary affirmance⁶ the Union attempted to withdraw these additional questions on which the Missouri Supreme Court has not previously expressed itself.

Ruling Staying Cause

Pending Determination of State Court Action

The defendant State officials have moved this Court to dismiss or to stay this action on the doctrine of abstention.

that this evidence shows concrete with respect to an effect upon the community.

“I think the testimony of the Mayor was quite accurate. Substantial inconvenience no doubt would result but substantial inconvenience is not jeopardy to interest, health and safety. His Honor told us that the hospitals would continue to function, the police stations would continue to operate, public utilities would continue to function, industrial plants would continue to work. That is all that one can expect in a contemporary community if the right to strike is to be preserved at all. And the King-Thompson Act does not purport to destroy the right to strike, it purports to regulate public utilities when there is a strike. On this record there is no such showing.

• • • • •

“Kansas City Transit, Inc., operates in Kansas and Missouri. There is no constitutional power in the State of Missouri to enjoin a strike against the Kansas City Transit, Inc., without the State of Missouri. The State of Missouri has no power to have its statutes operate extraterritorially.”

⁶ To save time in perfecting an appeal to the Supreme Court of the United States.

The Union opposes this motion and has moved for summary judgment on the merits. We have decided to stay this proceeding until the final determination of state court action now pending on the appeal submitted to the Supreme Court of Missouri. This decision includes deferring decision on plaintiff's motion for summary judgment. The reasons for this discretionary ruling follow.

Where (1) unsettled questions of state law are enmeshed with federal questions in determining the validity and constitutionality of a state law or of state action,⁷ and (2) the state law problems are delicate ones, resolution of which is not without substantial difficulty,⁸ proper exercise of federal jurisdiction requires that the controversy be decided in the state tribunal preliminary to a federal court's consideration of the underlying federal questions, usually a federal constitutional question.⁹ This is the "doctrine of abstention." The doctrine is not founded upon lack of power or jurisdiction but upon a sound judicial discretion

⁷ *Railroad Commission v. Pullman*, 312 U.S. 496, 61 S. Ct. 643, 85 L. ed. 971; *Spector Motor Service, Inc. v. McLaughlin*, 326 U.S. 101, 65 S. Ct. 152, 89 L. ed. 101; *Meridian v. Southern Bell Telephone Co.*, 358 U.S. 639, 79 S. Ct. 455, 3 L. ed. 2d 562.

⁸ *Meridian v. Southern Bell Telephone Co.*, 358 U.S. 639, 79 S. Ct. 455, 3 L. ed. 2d 562.

⁹ *Railroad Commission v. Pullman*, 312 U.S. 496, 61 S. Ct. 643, 85 L. ed. 971; *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 82 S. Ct. 676, 7 L. ed. 2d 623; *Chicago, Burlington & Quincy R. Co. v. City of North Kansas City* (C.A. 8) 276 F. 2d 932, i.e. 937-940; Annotations 94 L. ed. 879 and 3 L. ed. 2d 1827; 1A Moore's *Federal Practice*, ¶ 0.203, p. 2101, *et seq.*; 1 Barron & Holtzoff, *Federal Practice and Procedure*, § 64, p. 339 *et seq.* In *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 65 S. Ct. 1384, 89 L. ed. 1725, the doctrine was applied by the Supreme Court of the United States in dismissing *certiorari* to review an Alabama Supreme Court decision in a declaratory judgment action challenging the validity of a state statute regulating labor unions.

of the District Court to decline to exercise jurisdiction in a proper case.¹⁰ It is applicable in cases of federal juris-

¹⁰ *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L. ed. 2d 1058. See also Kurland, *The Federal Court Abstention Doctrine*, 24 F.R.D. 481. It is not necessary to determine the soundness of the defendants' contention that § 2283, Title 28, U.S.C. deprives the Court of jurisdiction to grant the relief sought by the Union in this case. The provision relied on reads as follows:

"A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The defendants and *amici curiae* contend that this statute forbids the issuance of the injunction or the entry of declaratory judgment sought by the Union, regardless of the principles of the doctrine of abstention, citing *inter alia*, *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 60 S. Ct. 215, 84 L. ed. 536; *H. J. Heinz Co. v. Owens* (C.A. 9) 189 F. 2d 505, *reh. den.* 189 F. 2d 505, *cert. den.* 342 U.S. 905, 72 S. Ct. 294, 96 L. ed. 677. Furthermore, on the application of the abstention doctrine in a case involving a claim of preemption, the defendants rely on a 1955 decision adopted by a 5-3 vote of the Supreme Court of the United States, with Mr. Justice Harlan not voting. *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 75 S. Ct. 452, 99 L. ed. 600. Only Mr. Justice Frankfurter and Mr. Justice Clark of the five man majority remain on the Court. All dissenters and Mr. Justice Harlan remain. Whether this opinion would be followed today is not known. The question is annotated in 99 L. ed. 614. The dual problem of the application of the abstention doctrine and of the restrictions of § 2283 were discussed in *Leiter Minerals v. U.S.*, 352 U.S. 220, 77 S. Ct. 287, 1 L. ed. 2d 267. In a case similar to this involving a New Jersey statute, the Court granted a stay to the state officials, against whom an injunction was sought. *Traffic Telephone Workers Federation v. Driscoll*, restraining order granted, 71 F. Supp. 681, injunction denied and stay granted, 72 F. Supp. 499, appeal dismissed 332 U.S. 833, 68 S. Ct. 221, 92 L. ed. 406.

We hold that the doctrine of abstention applies in this case, considered apart from § 2283. Application of defendants' construction of § 2283 would also warrant the denial of the relief sought by the Union.

diction not involving charges of violation of the Federal Constitution.¹¹ Therefore, the doctrine of abstention is applicable in this case whether the question of preemption be considered a constitutional question or a question of statutory construction.

In essence, the doctrine of abstention arose from federal policies of avoiding unnecessary decisions, of avoiding presumptuous and possibly erroneous first constructions of state statutes, and of avoiding needless friction between the federal and state systems. These themes recur in the many cases applying and refusing to apply the doctrine.

If anything prevents a prompt state court determination, this Court retains the power to take appropriate action necessary for a just disposition of this litigation.¹²

It has been suggested that because this case was filed before the state court action, that the doctrine of abstention does not apply. This contention is not supported by reason or precedent. The application of the doctrine does not depend upon the result of a race to the state and federal courthouses. It may be applicable where the state court suit is filed after the federal action is filed¹³ or even where the state court suit has not been, but can be, filed.¹⁴

¹¹ *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 60 S. Ct. 628, 84 L. ed. 876; *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. ed. 2d 1170; 1 Barron & Holtzoff, *Federal Practice and Procedure*, § 64 (Supp. 1962, pp. 69-70); 1A Moore, *Federal Practice*, ¶ 0.203 (2), p. 2115.

¹² *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L. ed. 2d 1058.

¹³ *City of Chicago v. Fieldcrest Dairies*, 316 U.S. 168, 62 S. Ct. 986, 86 L. ed. 1355.

¹⁴ *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. ed. 2d 1170; *Chicago, Burlington & Quincy R. Co. v. City of North Kansas City* (C.A. 8) 276 F. 2d 932; Annotation 3 L. ed. 2d 1827.

In the case at bar, two unsettled questions of state law have been litigated in the Jackson County Circuit Court. These are the questions of extraterritoriality and propriety of the Governor's proclamation when considered in light of the actual facts. The Union has attempted to "withdraw" these litigated questions from consideration by the Supreme Court of Missouri.

In Missouri the scope of review cannot be regulated by an appellant, particularly in non-jury cases. The Supreme Court of Missouri has the power, ordinarily exercised, to pass upon all legal and factual issues presented by the record and to render such judgment as the trial court should have rendered. The review is *de novo* on the record made in the trial court.¹⁵

We have given consideration to the limitations on the doctrine of abstention reviewed in the authorities cited herein, and in plaintiff's brief, but find them inapplicable here.¹⁶

We accept the statement of the nature of the doctrine as an extraordinary and narrow exception to the duty of

¹⁵ Missouri Civil Rule 73.01(d); *Hubert v. Magidson* (Mo. Sup. 1951) 243 S.W. 2d 337, l.e. 341; *Milanko v. Austin* (Mo. Sup. 1951) 241 S.W. 2d 881, where there were no sufficient assignments of error by appellant. Furthermore, in this case, *amici curiae* have raised and briefed the unsettled questions which the Missouri Supreme Court may consider in cases of public interest such as this. *State v. Smith* (Mo. Sup. 1945) 164 S.W. 2d 598, l.e. 600, *en banc*.

¹⁶ This Court is indebted to counsel for the Union, to counsel for the State and to Counsel for *amici curiae* for splendid briefs and arguments. The oral argument of Bernard Dunau, Esquire, of Washington, D.C., for the Union was excellent. The Union's briefs are exceptionally well organized, clear and comprehensive. Counsel for the defendant State officials and counsel for *amici curiae* have presented equally forceful arguments and briefs which would be expected of such experienced and able advocates.

a District Court to adjudicate a controversy before it.¹⁷ We are conscious of the need for exceptional circumstances to justify invocation of the doctrine.

We find present in this case the following principal exceptional circumstances, *inter alia*, on which we base the action in this case:

- (1) Presence of two substantial unsettled questions of state law, either of which, if resolved against the state, will make this case moot.
- (2) Unusual speed in processing the state court case to the point of submission of the appeal.
- (3) Cooperation of state officers in expediting the state court case, including suspension of the ordinary rules of oral argument and submission.
- (4) Desirability of avoiding needless friction between the state and federal officials and courts in a sensitive area of great public concern.
- (5) Undoubted confidence in the sincerity and good faith of the officials and counsel of Missouri.¹⁸

These, among other factors, have appealed to our discretion to exercise the power of abstention.

For the reasons we have stated, the defendants' motion to stay this proceeding is sustained and the defendants' motion to dismiss is overruled. Decision on plaintiff's motion for summary judgment is deferred.

IT IS SO ORDERED.

¹⁷ *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 79 S. Ct. 1060, 3 L. ed. 2d 1163; *Meredith v. Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L. ed. 9.

¹⁸ And in the sincerity and good faith of the Union officials and Union counsel.

APPENDIX D

THE KING-THOMPSON ACT

Chapter 295, RSMo 1949

PUBLIC UTILITY LABOR DISPUTES
MEDIATION AND SEIZURE

295.010. *Labor relations affecting public utilities—state policy.*—It is hereby declared to be the policy of the state that heat, light, power, sanitation, transportation, communication, and water are life essentials of the people; that the possibility of labor strife in ~~utilities~~ operating under governmental franchise or permit or under governmental ownership and control is a threat to the welfare and health of the people; that utilities so operating are clothed with public interest, and the state's regulation of the labor relations affecting such public utilities is necessary in the public interest. (L. 1947 V. I p. 358 § 1)

295.020. *Definitions.*—1. The term “*public utility*” shall include any person engaged in the business of producing, distributing, selling or otherwise furnishing electric light or power, heat, gas, steam, water, sewer service, transportation excepting railroads, communication, or any one or more of them to the people of Missouri.

2. The term “*person*” means any individual, firm, co-partnership, corporation, municipal corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

3. The term “*representative*” means any person or persons, labor union, organization, or corporation designated either by a utility or group of utilities or by its or their employees to act or do for them.

4. The term “*collective bargaining*” shall be understood to embody the philosophy of bargaining by employees through representatives of their own choosing, and shall

include the right of representatives of employees' units to be consulted and to bargain upon the exceptional as well as the routine wages, hours, rules, and working conditions.

5. The term "*labor dispute*" shall involve any controversy between employer and employees as to hours, wages, and working conditions. The fact that employees have amicable relations with their employers shall not preclude the existence of a dispute among them concerning their representative for collective bargaining purposes.

6. The term "*employee*" shall refer to anyone in the service of another, actually engaged in or connected with the operation of any public utility throughout the state.

7. The term "*board*" shall mean the state board of mediation. (L. 1947 V. I p. 358 § 2)

*295.030. *Governor to appoint state board of mediation—members—qualifications—terms—vacancy.*—1. Within thirty days after the effective date of this chapter the governor, by and with the advice and consent of the senate, shall appoint five competent persons to serve as a state board of mediation; two of whom shall be employers of labor, or selected from some association representing employers of labor, and two of whom shall be employees holding membership in some bona fide trade or labor union; the fifth shall be some person who is neither an employee nor an employer of labor and who shall be chairman of said state board of mediation.

2. Two members of said board shall be appointed for one year, two for two years, and one for three years, and all appointments thereafter shall be for three years or until their respective successors are appointed in the manner herein provided.

3. If a vacancy occurs in said board by death or otherwise, at any time, the governor shall appoint some compe-

tent person having the same qualifications as his predecessor to fill the unexpired term. (L. 1947 V. I p. 358 § 3).

295.040. *Oath of members—main office—meetings.*—Each member of said board shall, before entering upon the duties of his office, take and subscribe an oath to support the Constitution of the United States and this state and to demean himself faithfully in his office. The main office of the state board of mediation shall be in Jefferson City, but the board may hold meetings at any time or any place in the state whenever the same shall become necessary, and three members of the board shall constitute a quorum for the transaction of business. (L. 1947 V. I p. 358 § 4)

295.050. *Duties of chairman.*—The chairman of the board shall devote his full time to his duties and shall have charge of the office of the board. He shall keep all records of the proceedings of the board, and shall supervise the work of the employees of the board, and shall have such other powers and duties as may be conferred, or imposed upon him by the board. (L. 1947 V. I p. 358 § 5)

295.060. *Compensation and expenses of board members.*—The chairman of the board shall receive a salary of five thousand dollars per annum, payable monthly; each of the other members of the state board of mediation shall receive fifteen dollars per day for the time spent in the performance of their duties. All members shall receive traveling and other expenses incurred in the performance of their duties. (L. 1947 V. I p. 358 § 6)

295.070. *Powers and duties of board.*—1. The state board of mediation shall have power to employ and fix the compensation of conciliators and other assistants and to delegate to such assistants such powers as may be necessary to carry out its duties under this chapter. The board shall by regulation prescribe the methods of procedure before it.

2. The board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the pro-

duction of evidence which relates to any matter under investigation by the board. In cases of refusal to obey a subpoena issued by the board the circuit court of Cole county or of any county where the person refusing to obey such subpoena may be found, on application by the board, shall have power to issue an order requiring such person to appear before the board and to testify and produce evidence ordered touching the matter under investigation, and any failure to obey such order shall be punished by the court as a contempt thereof. (L. 1947 V. I p. 358 § 7)

295.080. *Labor disputes—action by board.*—1. Upon receipt of notice of any labor dispute between parties subject to this chapter, the board shall require such parties to keep it advised as to the progress of negotiations therein.

2. Upon application of either party to a labor dispute or upon its own motion the board may fix a time and place for a conference between the parties to the dispute and the board or its representative, upon the issues involved in the labor dispute and shall take whatever steps it deems expedient to bring about a settlement of the dispute including assisting in negotiating and drafting a settlement agreement.

3. It shall be the duty of all parties to a labor dispute to respond to the summons of the board for joint or several conferences with it or with its representatives and to continue in such conference until excused by the board or its representative. (L. 1947 V. I p. 358 § 8)

295.090. *Labor agreements—renewal.*—All collective bargaining labor agreements hereafter entered into between the management of a utility and its employees or any craft or class of employees shall be reduced to writing and continue for a period of not less than one year from the date of the expiration of the previous agreement entered into between the management of the utility and its employees or if there has been no such previous agreement then for a period of not less than one year from the date of the actual

execution of the agreement. Such agreement shall be presumed to continue in force and effect from year to year after the date fixed for its original termination unless either or both parties thereto inform the other, in writing, of the specific changes desired to be made therein and shall also file a copy of such demands with the state board of mediation, at least sixty days before the original termination date of sixty days before the end of any yearly renewal period, or sixty days before any termination date desired thereafter. (L. 1947 V. I p. 358 § 10)

Sec. 295.100. *Changes in Labor Agreement—Notice.*—

1. In the case of all existing labor contracts, agreements or understandings which do not provide for at least a sixty-day notice of desired changes and which contracts, agreements or understandings terminate after seventy days following the effective date of this chapter, the parties thereto shall nevertheless inform, in writing, the other party or parties of any specific changes desired to be made in said contract, agreement or understanding and file a copy of such desired changes with the state board of mediation at least sixty days before the date fixed for the termination of said contract, agreement or understanding.

2. In the case of labor contracts, agreements or understandings terminating within seventy days after this chapter shall become effective, the parties thereto shall forthwith, or not later than ten days after the effective date of this chapter, inform the other party, in writing, of the specific changes desired to be made in said contract, agreement or understanding and promptly file a copy of such demands with the state board of mediation.

Sec. 295.110. *Changes in Employment Terms in Absence of Labor Contract.*—Whenever, after the effective date of this chapter, a situation exists in any utility whereby employees are rendering services under terms and conditions which were not at the time this chapter becomes effective and which have not heretofore been the subject of the con-

tract, and said employees desire to effectuate a change in the terms of employment or a utility desires to effectuate a change in said terms of employment, then and in that event, it shall be the duty of the party desiring such change, not less than sixty days prior to the desired effective date thereof, to inform the other party in writing of the specific changes so desired in the manner in which they are desired, either by written contract or otherwise and to file a copy of such terms with the state board of mediation.

295.120. Public hearing panel—members—powers—hearings.—1. In the event that management of a utility and the representatives for collective bargaining purposes of any craft or group of employees of such utility shall not have reached and executed a final agreement in writing as to all conditions of employment affecting such employees on or before the termination date of any existing contract, agreement or understanding or any renewal thereof, or unless the parties shall have, before said date, agreed to submit any and all disputes between them to arbitration, the management of such utility and the representatives of such employees shall, within five days after such termination date, each designate, in writing, a person as a public hearing panel member and file such designation with the state board of mediation; the two persons so designated shall choose a third disinterested and impartial person and these three shall compose and act as a panel.

2. The panel shall promptly proceed and within fifteen days following their designation hold and complete public hearings on the specific changes so requested, to the contract, agreement or understanding. Said period of fifteen days may be extended by the mutual written consent of the parties. The panel shall give to each party full notice and opportunity to be heard, but the failure of either party to appear before the panel at the time and place fixed by it shall not deprive the panel of jurisdiction to proceed to

a hearing and to make report thereon as herein provided. (L. 1947 V. I p. 358 *14)

295.130. *Appearance in person or by counsel—notice of hearing.*—Parties may be heard either in person or by counsel as they may elect, and the panel shall give due notice of all hearings to the employee or employees or their representatives and the public utility or utilities involved in the labor dispute. (L. 1947 V. I p. 358 § 15)

295.140. *Selection of party representatives.*—Representatives for the purposes of this chapter shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other. Representatives of employees for the purpose of this chapter need not be persons in the employ of the utility. (L. 1947 V. I p. 358 § 16)

295.150. *Report of hearing to governor.*—Within five days after closing such hearings the panel shall file with the governor, in writing, a report setting forth a statement of the controversy, a resumé of the evidence submitted to it and its recommendations based thereon. (L. 1947 V. I p. 358 § 17)

295.160. *Appointment of representatives by board when not designated by parties.*—1. In the event either management of the utility involved or the representatives of the employees for collective bargaining purposes shall fail or neglect to designate, as herein provided, such a person to represent it upon the panel or the two so designated shall fail to agree upon the third member of the panel, within ten days after the date fixed for the termination of such contract, agreement or understanding or upon failure to file such designations or any of them with the state board of mediation within said ten-day period, the state board of mediation shall appoint such person or persons, selecting in each case a person qualified by previous experience or employment to represent employers, employees or the public as the case may require.

2. Should both management and the representatives of the employees fail or neglect to designate representatives upon said panel within the time herein required, then the state board of mediation shall appoint a panel of three persons, to be selected as follows: one to represent management of the utility, giving the management forty-eight hours to select its preference from a list of five persons submitted by the board to the management before designating such person; one to represent the employees involved, giving their representative forty-eight hours to select their preference from a list of five persons submitted by the board to such representative, before designating such person; and one to act as the impartial third person. Failure on the part of either party to make such selection shall not prevent the board from appointing the members of the panel from the lists submitted. (L. 1947 V. I p. 358 § 18)

295.170. *Proceedings Not to Supersede Voluntary Arbitration.*—Compulsory arbitration, as provided in this chapter shall not be effective in disputes where voluntary arbitration is a part of the contract between the disputing parties. In the event that through the voluntary arbitration disputing parties cannot agree, the state board of mediation shall then enforce the compulsory arbitration as provided.

295.180. *Utility strike—power of governor.*—1. Should either the utility or its employees refuse to accept and abide by the recommendations made pursuant to the provisions of this chapter and as a result thereof the effective operation of a public utility be threatened or interrupted, or should either party in a labor dispute between a utility and its employees, after having given sixty days' notice thereof, or failing to give such notice, engage in any strike, work stoppage or lockout which, in the opinion of the governor, will result in the failure to continue the operation of the public utility, and threatens the public interest, health and welfare, or in the event that neither side has given notice

to the other of an intention to seek a change in working conditions, and there occurs a lockout, strike or work stoppage which, in the opinion of the governor, threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare, then and in that case he is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest.

2. Such power and authority may be exercised by the governor through such department or agency of the government as he may designate and may be exercised after his investigation and proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of a labor dispute, a threatened or actual strike, a lockout or other labor disturbance, and that the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility; provided, that whenever such public utility, its plant, equipment or facility has been or is hereafter so taken by reason of a strike, lockout, threatened strike, threatened lockout, work stoppage or slowdown, or other cause, such utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable after the settlement of said labor dispute, and it shall thereupon be the duty of such utility to continue the operation of the plant facility, or equipment in accordance with its former and certificate of public convenience and necessity. (L. 1947 V. I p. 358 § 19)

295.190. *Governor to prescribe rules and regulations.*—The governor is authorized to prescribe the necessary rules and regulations to carry out the provisions of this chapter. (L. 1947 V. I p. 358 § 20)

295.200. *Unlawful acts—penalties—enforcement of provision.*—1. It shall be unlawful for any person, employee, or representative as defined in this chapter to call, incite,

support or participate in any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state under this chapter, as means of enforcing any demands against the utility or against the state.

2. It shall be unlawful for any public utility to employ any person or employee who has violated paragraph 1 of this section except that such person or employee may be employed only as a new employee.

3. Any labor organization or labor union which violates paragraph 1 of this section shall forfeit and pay to the state of Missouri for the use of the public school fund of the state, the sum of ten thousand dollars for each day any work stoppage resulting from any strike which it has called, incited, or supported, continues, to be recovered by civil action in the name of the state and against the labor organization or labor union in its commonly used name.

4. Any officer of any labor organization or labor union representing employees of public utilities who participates in calling, inciting or supporting any strike in violation of paragraph 1 of this section shall forfeit and pay to the state of Missouri, for the use of the public school fund of the state, the sum of one thousand dollars to be recovered by civil action in the name of the state and against such officer.

5. Any public utility that engages in a lockout which brings about a work stoppage shall forfeit and pay to the state of Missouri, for the use of the public school fund of the state, the sum of ten thousand dollars for each day of work stoppage caused by such lockout, said amount to be recovered by civil action in the name of the state and against the public utility; provided further, that if, upon any investigation, supported by competent evidence, by the state board of mediation, it shall appear that any public

utility has refused to bargain collectively in good faith with its employees over the terms and conditions of employment, said state board of mediation shall certify such record and proceedings to the public service commission, and, upon consideration of the facts in such record and proceedings the public service commission shall find that the evidence justifies such action, it may revoke the certificate of convenience and necessity of such public utility, or impose such other conditions upon such public utility as may be provided by law. Any such action by said public service commission shall be subject to review in the courts of this state in the same manner as other orders or decisions of said commission.

6. The courts of this state shall have power to enforce by injunction or other legal or equitable remedies any provision of this chapter or any rule or regulation prescribed by the governor hereunder. (L. 1947 V. I p. 358 § 21)

295.210. *Meaning of law.*—No employee shall be required to render labor or service without his consent; nor shall anything in this chapter be construed to make the quitting of his labor or services by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent. (L. 1947 V. I p. 358 § 22)

APPENDIX E

Excerpts From Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. § 141, et seq.)

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers

to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening

or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NA- TIONAL EMERGENCIES

FUNCTIONS OF THE [FEDERAL MEDIATION AND CONCILIATION] SERVICE

SEC. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper; to ascertain the facts with respect to the causes and circumstances of the dispute.

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted,

the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 604.

**DIVISION 1287 of the AMALGAMATED ASSOCIATION
of STREET, ELECTRIC RAILWAY and MOTOR COACH
EMPLOYEES of AMERICA et al.,**
Appellants,

VS.

STATE OF MISSOURI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI.

MOTION TO DISMISS THE APPEAL.

THOMAS F. EAGLETON,
Attorney General of Missouri,
J. GORDON SIDDENS,
Assistant Attorney General of
Missouri,

JOHN C. BAUMANN,
Assistant Attorney General of
Missouri,
Supreme Court Building,
Jefferson City, Missouri,
Attorneys for Appellee.

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Pursuant to Rule 16 of this Court, appellee moves to dismiss the appeal on the ground that the appeal is not within the jurisdiction of this Court, the judgment below not being a final one, from which appeal is authorized, and on the further ground that the federal question sought to be reviewed was not expressly passed on below and may be rendered moot by further proceedings in the Circuit Court of Jackson County, Missouri, or by action of the Governor in terminating seizure.

STATEMENT

This is an appeal from a judgment of the Supreme Court of Missouri, sitting *en banc*, entered on October 8, 1962, modifying and affirming in part a decree of the Circuit Court of Jackson County, Missouri. The opinion of the Supreme Court of Missouri is now reported at 361 S.W.2d 33. The Circuit Court decree, entered on February 12, 1962, would have permanently enjoined appellants from "continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri" which had, pursuant to State law, taken over the operation of public transit facilities in Kansas City, Missouri.

The Missouri Supreme Court held that the act in question, the King Thompson Act, Chapter 295, R.S. Mo. 1959, can only be invoked to safeguard the continuance of public utility services "in emergency situations. We must and do construe the term 'emergency' to imply a *temporary* situation and necessarily dependent upon the particular facts of the particular case under consideration. Nor can we construe the Act as authorizing a permanent injunction prohibiting defendants from striking against either the Company or the State and therefore, the court should have retained jurisdiction of the cause, so that the equitable relief granted might be modified in accordance with changing conditions." Jurisdictional Statement, 32a (emphasis supplied).

The Court continued (page 33a): "There is no contention here by the State, nor has this Court held that the total stoppage of the mass transportation system in Kansas City, after reasonable notice and an opportunity to the public to adjust to such a situation, would create a permanent

emergency situation entitling the State to a permanent injunction against a concerted stoppage of work, or authorizing the State to indefinitely operate the transportation system on the theory of protecting the citizens from disaster in an emergency situation. Nor does this Court expect to so hold. However, in this case, jeopardy to the public, within the meaning of the provisions of the Act and as construed by this Court, is now admitted by appellants to have existed at the time of the seizure and the entering of the judgment appealed from.

"If the emergency situation no longer in fact exists, appellants may apply to the court for a modification of the decree on terms, since it is not this Court's purpose or intention to hold that the mere total discontinuance of mass transportation services in Kansas City, Missouri, after reasonable notice to the public will necessarily create such an emergency or evidence such an impending disaster to public health, safety and welfare as to justify permanent injunctive relief under the King-Thompson Act."

Earlier in the opinion, the Court said (page 31a): "We find nothing in the Act to prevent appellants from making application to the Governor at any time for the release of the property of the utility upon reasonable notice and terms and any such release would relieve appellants from the particular judgment entered in this case. Further, as hereinafter mentioned, in the event of the denial of such relief appellants could apply to the trial court for a modification of the judgment theretofore entered."

Instead of seeking Circuit Court relief from the temporary restraint which the Missouri Supreme Court affirmed or seeking relief from the Governor as suggested, appellants seek review in this Court.

ARGUMENT.

Appellants rely upon 28 U.S.C., Section 1257, as authority for this appeal. Review under that statute is limited to "final judgments." It is settled that the Court is without jurisdiction to review State Court decisions affirming temporary injunctions. *Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178. The cited decision, like the case at bar, involved a temporary injunction against labor union activity, which the unions claimed to be beyond the reach of local authorities, by reason of the Taft-Hartley Act. Unlike the case at bar, the state appellate court opinion dealt with the merits in a way which offered no ground for hope that the defendants could be freed from the restraint, upon application to the trial court. Nevertheless, this Court rejected review without difficulty, stating (l.c. 180-181):

"From the earliest days, this Court has refused to accept jurisdiction of interlocutory decrees, such as is involved in this case * * *. The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity. The classical concept was at once recognized and applied in *Gibbons v. Ogden*, *supra*. There is no room here for interpretation. The rule remains unchanged.

"True, as long as a temporary injunction is in force it may be as effective as a permanent injunction, and for that reason appeals from interlocutory judgments have been authorized by state legislatures and Congress. But such authorization does not give interlocutory judgments the aspect of finality here * * *."

In the case at bar, the portions of the opinion of the Missouri Supreme Court quoted above demonstrate that the restraint sustained is "temporary" in fact, as well as by label, and is therefore not susceptible of review under the limitations on appeal contained in the governing statute. Injunctive decrees under the King-Thompson Act are not permanent restraints, subject to modification upon unexpected or unpredictable changes in circumstances. They are based on emergency conditions which are temporary almost by definition. As suggested by the Missouri Supreme Court (p. 33a) the emergency feature of a transit strike may rest on such ephemeral factors as whether the public has "reasonable notice and an opportunity to adjust" to a prospective loss of service. The restraint in such a situation must fairly be considered temporary, and beyond the appellate jurisdiction of this Court. If State Court temporary injunctions in labor cases are deemed inconsistent with national labor policy, advocates of this view should seek amendment of the statute governing appeals to this Court, and should not ask the Court to reverse its settled interpretation of that statute.

Appellants recognize the question regarding finality of the judgment below, and seek to meet it in a footnote. Jurisdictional Statement, note 2, pages 13-14. They cite authorities in which permanent injunctions were granted, not rejected, as in the case at bar. They further aver that State Court litigation has reached a "definite stop," and "there is nothing more to be decided." If a "stop" has been reached in the State Courts, it is simply because appellants choose to allow the temporary injunction to continue unchallenged in the Circuit Court, in hopes of "making law" in this Court. They refuse to try either of the keys handed them by the Missouri Supreme Court. Contrary to appellants' assertion, there is a great deal more

to be decided, regarding the emergency requirements of Missouri law, as it applies to transit strikes. As in *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62, 71, "the fate of the whole litigation may well be affected by the fate of the unresolved contingencies * * *."

In the proceeding below, the Supreme Court of Missouri did not adjudicate the validity of *present* restrictions on appellants' activities, under State or Federal law. All that was decided, partly in reliance on appellants' concession (Jurisdictional Statement, pages 17a-19a, 33a) was that an emergency, under State law, existed at the time of seizure and when the temporary injunction was entered. Whether there now exists in Kansas City an emergency situation which permits present limitation on appellants' right to strike, under Missouri law, is an issue which has not been decided, but is expressly left in doubt by the decision of the Missouri Supreme Court. Neither the Governor, the Circuit Court nor the Supreme Court of Missouri has passed on this question.

Apart from the issue of finality, appellants' effort to "make law" in this case runs aground because their avoidance of the Circuit Court as a forum for determining the validity of present restraints necessarily destroys the concrete nature of the questions presented. Appellants urge the abstract invalidity of the King-Thompson Act, and are unwilling to litigate a concrete set of facts from which it could be determined whether a local emergency now exists. Their effort to overthrow the King-Thompson Act, under the Supremacy Clause, fails to tender "the underlying constitutional issues in clean-cut and concrete form, unclouded by any serious problem of construction relating either to the terms of the questioned legislation or to its interpretation by the state courts." Therefore, the appeal

should be dismissed. *Rescue Army v. Municipal Court*, 331 U.S. 549, 584-5. See *Government and Civic Employees Organizing Committee, CIO, v. Windsor*, 353 U.S. 364.

FEDERAL QUESTIONS ARE SUBSTANTIAL.

Appellants have written a lengthy Jurisdictional Statement in the purported belief "that this Court may wish to consider summary reversal of the judgment." Jurisdictional Statement, pages 25-26. Rather than leave the merits completely untouched at this time, appellee deems it appropriate to note its conclusion that the Federal questions, on both sides of this case, are substantial. Three members of this Court have indicated at least a preliminary view that the Missouri act in question is invalid, in whole or in part. *Local 8-6 Oil, Chemical & Atomic Workers Union v. Missouri*, 361 U.S. 363. The Missouri Supreme Court *en banc* has adopted well-reasoned opinions sustaining certain actions under the act. *Missouri v. Local 8-6 Oil, Chemical & Atomic Workers Union*, 317 S.W.2d 309; *Missouri v. Division 1287, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America*, pages 3a-44a, Jurisdictional Statement. Nothing has occurred since the writing of the latter opinion to upset its validity, and due deference to the Courts by advocates would seem to require the conclusion that the Federal questions are truly substantial.

Appellants place primary reliance on legal implications which they say flow from the decision in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 998, v. Wisconsin Employment Relations Board*, 340 U.S. 383. As noted, the Missouri Supreme Court has twice set forth what it believed to be controlling distinctions between that case and cases

under the King-Thompson Act. In the case at bar, the Court stated an important consideration, based on the injunction granted which is limited to prohibition against striking against the State of Missouri during State-operation of the transit system. This invokes the exception to the Federal act, defining "employer" so it does not apply to a State. 29 U.S.C., Section 152(2). Appellants respond with argument that State-operation is "technical" or "nominal". They also assert that preemption occurs even though utility company employees become State employees, from all standpoints—a contention directly contrary to the cited section of the act. If appellants are wrong in this latter contention, there remains a substantial question whether national labor policy is promoted by forcing a State to expand an emergency seizure of a public utility into a deeply entrenched relationship with utility workers, before coping with labor strife which can cripple a community.

Regarding a basic distinction between the invalid Wisconsin legislation and legislation directed toward resolving a local emergency, appellants must not only convict the Missouri Supreme Court of error but must also attribute identical error to as knowledgeable an expert on Federal labor law as the former Senator from Massachusetts, now President of the United States. In debating the so-called Holland amendment, Senator John F. Kennedy argued that it was unnecessary, because "the (State) courts have the power to act in cases in which the health, safety and basic welfare of the citizens of the State are at stake. The courts have been given by the States the power to seize industries to protect the public health and safety." 105 Cong. Rec. 6740. Senator Kennedy distinguished "true emergencies" from a particular transit strike, in Florida, which he treated as merely a matter

of "inconvenience." If Senator Kennedy is right, preemption turns on analysis by the Courts of the local emergency. The Federal issue thus is very close to the State law issue which appellants seek to avoid, when they ignore the Missouri Supreme Court's invitation to contend before the Governor or in the Circuit Court that there is no emergency requiring State seizure.

It is respectfully submitted appellants should avail themselves of the substantial remedies pointed out to them by the Supreme Court of Missouri and until they exhaust these remedies their appeal is premature, and should be dismissed.

THOMAS F. EAGLETON,
Attorney General of Missouri,

J. GORDON SIDDENS,
Assistant Attorney General of
Missouri,

JOHN C. BAUMANN,
Assistant Attorney General of
Missouri,

Attorneys for Appellee.

December, 1962.

CERTIFICATE OF SERVICE.

I, John C. Baumann, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served Appellants in the captioned case with the foregoing Motion to Dismiss the Appeal, by mailing, with proper postage affixed, two copies of said printed Motion to Dismiss the Appeal to appellants' attorneys, Mr. John J. Manning, of Manning & Fousek, 3333 Warwick Boulevard, Kansas City 11, Missouri; Mr.

Bernard Dunau, Attorney at Law, 912 DuPont Circle Building, Washington 6, D. C., and Mr. Bernard Cushman, Attorney at Law, 5025 Wisconsin Ave., N. W., Washington, D. C.

This 17th day of December, 1962.

JOHN C. BAUMANN,
Attorney for Appellee.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF
STREET, ELECTRIC RAILWAY AND MOTOR COACH
EMPLOYEES OF AMERICA, ET AL., *Appellants*

v.

STATE OF MISSOURI, *Appellee*

On Appeal From the Supreme Court of Missouri

**BRIEF IN OPPOSITION TO MOTION TO DISMISS
THE APPEAL**

BERNARD CUSHMAN
5025 Wisconsin Avenue, N. W.
Washington, D. C.

BERNARD DUNAU
912 Dupont Circle Building
Washington 6, D. C.

JOHN MANNING
3333 Warwick Boulevard
Kansas City, Missouri

Attorneys for Appellants

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 604

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF
STREET, ELECTRIC RAILWAY AND MOTOR COACH
EMPLOYEES OF AMERICA, ET AL., *Appellants*

v.

STATE OF MISSOURI, *Appellee*

On Appeal From the Supreme Court of Missouri

**BRIEF IN OPPOSITION TO MOTION TO DISMISS
THE APPEAL**

Appellee moves to dismiss the appeal on the ground that the judgment from which appeal is taken is not final. We anticipated this contention and treated it at page 13, note 2, of the Jurisdictional Statement. A few additional words may be helpful.

1. The judgment is final in fact and form. The injunction entered by the Circuit Court of Jackson County was preceded by a stipulation that "the evidence heretofore introduced herein on November 27 and 28, 1961, may be considered by the Court on both the temporary and *permanent* injunction" (R. 191, emphasis supplied). The decree thereafter entered by the Circuit Court expressly adjudged that appellants "be and they are hereby *permanently* enjoined and restrained from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri" (Tr. 192, emphasis supplied). In its ensuing judgment the Missouri Supreme Court ordered that the decree of the Circuit Court "be in all things affirmed, and stand in full force and effect," modifying it only to provide that "the trial court retains jurisdiction of the cause" (Jur. St., p. 1a). Retention of jurisdiction by the trial court was ordered "so that it may modify its decree with changing facts and conditions . . ." (Jur. St., pp. 42a, 31a-32a, 33a). The judgment is thus classically final, for it affirms a permanent injunction against a course of conduct, qualifying it only to permit its alteration upon a showing of changed circumstances, and this power of modification is inherent in any permanent injunction and exists even when unexpressed.¹

Montgomery Building & Construction Trades Council v. Ledbetter Erection Co., 344 U.S. 178, upon which appellee relies (p. 4), emphasizes the distinction which

¹ For recent illustrations, in addition to those cited in the Jurisdictional Statement at page 13, note 2, see *Drivers Union, Local 626 v. United States*, 31 U.S. Law Week 4009, 4011-12, 4013 (S. Ct., Nov. 19, 1962); *Cataldi v. Werth*, C.A.D.C., No. 16838, *sl. op.* p. 3 (Nov. 15, 1962).

confirms the finality of the instant judgment. For in that case appeal was taken from an "interlocutory decree" that "could have been readily converted into a final decree" but was not; had the conversion been made in that case "the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued . . ." (*id.* at 181). And the conversion which would have rendered the judgment appealable "without question" was to transform the injunction from temporary to permanent status. An injunction is temporary when it provides interim relief pending the determination whether a permanent injunction should be granted. "The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity" (*id.* at 180). That elementary distinction leaves no slightest room for doubt that the injunction in this case is classically and traditionally final and permanent. It does not grant interim relief pending decision of a request for a permanent injunction; it is the final grant of the ultimate relief sought.

2. The court below does not in any way intimate that the inherent power to modify a permanent injunction upon a showing of changed circumstances deprives its judgment of its character as a final and determinative disposition of the controversy on the record as it stands. It is therefore unnecessary to invoke the rule that, for "the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final . . . , but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not

subject to further review by a state court” *Department of Banking v. Pink*, 317 U.S. 264, 268.² For it is not local practice or the court below, but appellee alone, which calls the judgment “temporary,” and appellee derives this appellation exclusively from the power of future modification. The consequence of affixing the “temporary” label to the judgment is, as appellee maintains, to place it “beyond the appellate jurisdiction of this Court” (p. 5). But the consequence of placing the judgment beyond this Court’s jurisdiction is to put the question of the validity of the King-Thompson Act outside this Court’s reach even though the statute’s enforcement by injunctive process abridges federal rights. Plainly the requirement of finality cannot be traduced to mean, as appellee would have it, that there can never be a permanent injunction final enough to call into play this Court’s power to decide whether federal rights are violated by the restraint imposed. Not even a mechanical application of the requirement of finality, which this Court traditionally abjures, supports appellee in its game by which it exerts the full power of the King-Thompson Act but seeks to elude a test of the validity of the power it wields.

3. Several other factors show the emptiness of appellee’s claim:

(a) Appellee says that, until appellants return to the Governor and the Circuit Court with a claim that the “emergency” has ceased by the lapse of time and the injunction should therefore be vacated, recourse to this Court is premature (pp. 5-6). But this is an endless merry-go-round. For the same logic which

² See also, *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 72; *Gospel Army v. Los Angeles*, 331 U.S. 543, 546-547.

would require the first try would also require a second and third try. Furthermore, on an ultimate appeal to this Court from a refusal to vacate the judgment, appellants might well then be confronted with a formidable claim that the federal questions were foreclosed by res adjudicata through failure to appeal from the original judgment which authoritatively and adversely determined those questions.

(b) Application to the Governor and the Circuit Court can only raise the state question whether by state standards an "emergency" still exists warranting retention of seizure. Such recourse compels acceptance of the state scheme to secure state leave to exercise the federal right to strike. But the objective of this appeal is to be freed on federal grounds from the fetters which the state procedure has fastened on appellants. The gamut of the state procedure having been run once by appellants; the power of the state to impose it at all is now fully ripe for determination. Appellants should not be required to run the gamut twice. No new federal questions can be generated nor old ones elucidated by a second run. Appellants at this writing have for more than thirteen months been enjoined from striking. The time has come to decide the validity of this restraint.

(c) There is no basis upon which to return to the Governor and the Circuit Court to request vacation of the judgment. The same situation continues in being which initially persuaded the Governor, the Circuit Court, and the Missouri Supreme Court to find that by state standards the requisite jeopardy exists to "public interest, health and welfare." Nothing has altered. There is no single differentiating feature which can be even plausibly argued. In the absence of a change

in situation, to request vacation of the judgment would be irresponsible, and, in the bizarre event that the request were seriously entertainable, it would add to the invalidity of the King-Thompson Act by demonstrating the utter capriciousness of its administration. A judgment vacated where nothing has changed gives no assurance that a resumed strike would not after a few days be again enjoined by a fresh institution of seizure. Facing the federal questions now is essential to vindication of the federal rights asserted and is fully compatible with the requirement of finality and "the policy against fragmentary review" (*Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 71) which it serves.

Respectfully submitted,

BERNARD CUSHMAN

5025 Wisconsin Avenue, N. W.
Washington, D. C.

BERNARD DUNAU

912 Dupont Circle Building
Washington 6, D. C.

JOHN MANNING

3333 Warwick Boulevard
Kansas City, Missouri

Attorneys for Appellants

December, 1962

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IN THE
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OCTOBER TERM, 1962

NO. 604

DIVISION 1287 OF THE AMALGAMATED
ASSOCIATION OF STREET, ELECTRIC RAILWAY
AND MOTOR COACH EMPLOYEES OF AMERICA,
ET AL., *Appellants*

v.

STATE OF MISSOURI, *Appellee*

**ON APPEAL FROM THE SUPREME COURT OF
MISSOURI**

**BRIEF FOR THE AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS AS AMICUS CURIAE**

INTEREST OF THE AFL-CIO AND INTRODUCTION

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is primarily a federation of national and international unions, including the appellant union. The total membership of unions affiliated with the AFL-CIO is approximately 13 million. This brief is submitted because of the importance to all unions of the issue in this case.

That issue is the validity of a Missouri statute known as the King-Thompson Act.¹ This creates a State Board of Mediation to handle labor disputes affecting public utilities. It requires that notice of such disputes be sent the Board; confers powers of mandatory mediation on the Board; and provides for the appointment, with or without the cooperation of the employer and the union, of a "public hearing panel," which is empowered to hold a public hearing on the dispute, and to make a report, including recommendations for settlement, to the governor. (§§295.120-295.160.) (This procedure is referred to in the statute, not inaptly, as "compulsory arbitration." See §295.170.) If either side refuses to accept the recommendations, or if a strike otherwise eventuates or threatens, the governor is authorized to take possession of the facility, "for the use and operation by the state of Missouri." (§295.180.) When a facility has been taken over by the State it is unlawful to engage in a strike "as a means of enforcing any demands against the utility or against the state." (§295.200.) Both the union and the employees are subject to severe penalties for violation. (§295.200.)

The American labor movement has always opposed, and now opposes, both compulsory arbitration and anti-strike legislation, save as a last resort in time of national peril.

In our view the King-Thompson Act embodies the worst features of both anti-strike legislation and compulsory arbitration.

Its ban against striking, once the governor purports to take "possession," is absolute.

As respects compulsory arbitration, the union's only alternative to accepting the recommendations of the public

¹ Ch. 295, Rev. Stat. Mo. 1949. The Act is set out in full in Appendix D (pp. 55a-65a) of the Jurisdictional Statement, and is analyzed in detail at pp. 12-16, *infra*.

hearing panel, or, in the present case, of the State Board of Mediation, is seizure by the governor, which means continuation of the status quo. Since the union will normally be seeking to change the status quo to the advantage of the employees, that is a Hobson's choice. Viewed pragmatically, the "recommendations" are binding on the union.

They are not binding on the employer, however, since to it continuation of the status quo as respects wages, hours, and working conditions will normally be a not merely acceptable but highly desirable alternative.

Thus the reality is to be that there is compulsory arbitration for the union and not for the employer.

However, even if we accepted the assertion of the court below that the King-Thompson Act does not provide for compulsory arbitration,² that would not make it more palatable to us.

A ban on strikes, unaccompanied by any procedure for resolving disputed issues over wages and working condi-

² The court stated (R. 188):

"The King-Thompson Act makes no provision for arbitrators who shall hear and finally *determine* labor *disputes*, nor does the King-Thompson Act deny to utility employees the right to strike. No issue as to compulsory arbitration is presented on this record." (Emphasis in the original.)

These assertions are typical of the opinion of the Missouri Court, which is throughout concerned only with form, never with substance.

While the union is nominally free to reject the "recommendations," the result will be seizure and continuation of the status quo. The statute, unlike the court below, does not blink the use of the term "compulsory arbitration." See *e.g.*, §295.170.

Similarly, the court's assertion that the Act does not "deny to utility employees the right to strike" evidently rests on the assumption, never made explicit, that after seizure the employees are not *utility* but *state* employees.

All this is the merest sophistry.

tions, is more inequitable to employees than compulsory arbitration, distasteful though the latter may be. A naked strike ban merely legislates the continuation of the status quo. Such a law is as objectionable as compulsory arbitration from the standpoint of the coercion involved, and, unlike compulsory arbitration, it holds out no hope to the employees of achieving improvements in wages or working conditions. From the standpoint of sound industrial relations, an arbitration award at least undertakes to settle the disputed issues, while an anti-strike law merely freezes the inflamed area temporarily, doing nothing toward effecting a permanent cure.

At all events the AFL-CIO is opposed both to banning strikes and to compulsory arbitration, and we regard such laws as the King-Thompson Act as a grave threat to free collective bargaining and a free economy. We take our stand with Senator Taft, who during the Taft-Hartley debate declared (93 Cong. Rec. 3835):

"We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. . . .

"If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. . . .

"We did not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure,

or to any other action. We feel that it would interfere with the whole process of collective bargaining. * * *

In its general philosophy, as well as in numerous specific provisions (as will be shown later) the King-Thompson Act conflicts utterly with Taft-Hartley.

The King-Thompson Act, and similar laws in about a dozen other states, were enacted in 1947, evidently, as a reaction to a long and bitter strike in that year against the Duquesne Power Company in Pittsburgh.⁴ A few other states have enacted such laws at various times,⁵ the earliest being the Court of Industrial Relations Act of Kansas, which goes back to 1920.⁶

However in 1951, in *Amalgamated Ass'n, Etc. v. Wisconsin Employ. Rel. Bd.*, 340 U.S. 383, this Court held invalid a Wisconsin law which forbade employees of public utilities to strike, and provided for compulsory arbitration. The Wisconsin statute, this Court held, invaded a field pre-empted by the federal Labor Management Relations Act of 1947, and in addition, conflicted in various particulars with that federal Act.

Since that decision, the various state public utility anti-strike laws, whether utilizing seizure or compulsory arbitration, or a combination of the two, have usually been regarded as invalid, and in most states have become dead letters.⁷ A more narrowly drawn Massachusetts statute,

³ Quoted in *Amalgamated Ass'n, Etc. v. Wisconsin Employ. Rel. Bd.*, 340 U.S. 383, 406, n. 4.

⁴ See Rosenn, "State Intervention in Public Utility Disputes," 12 Lab. L. J. 387, 388 (1961).

⁵ The statutes are listed in Rosenn, *op. cit. supra* note 4, at 388, and in Note, "State Seizure of Industries," 48 Va. L. Rev. 699 (1962).

⁶ This statute was held unconstitutional in *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522.

⁷ See Sussna, "State Intervention In Public Utility Labor-Management Relations," 9 Lab. L. J. 35 (1958); Note, 27 Temple L. Q. 195, 200-202 (1953).

which did not forbid strikes but empowered a public board to conduct hearings and render a report apportioning blame and recommending terms of settlement, was held invalid as in conflict with the federal Act in *General Electric Co. v. Callahan*, 294 F. 2d 60 (1st Cir. 1961). However, Missouri and Virginia have continued even since the *Amalgamated* decision to enforce their public utility anti-strike laws.* A ruling of the Missouri Attorney General, rendered immediately after this Court's decision in *Amalgamated*, that the Missouri statute was unconstitutional, was overturned by the State Supreme Court,⁹ and attempts to secure review by this Court of state decisions upholding the Virginia and Missouri statutes have been frustrated by this Court's stringent rule on mootness. *Harris v. Battle*, 348 U.S. 803; *Local No. 8-6, Oil, Etc., Workers Union v. Missouri*, 361 U.S. 363.

The AFL-CIO is concerned that if the Missouri statute is upheld in this case (as we do not see how it can be), other states will undertake enforcement of their public utility anti-strike laws, with consequent erosion of the national labor relations policy of free collective bargaining. Alternatively, if the State of Missouri succeeds in its belated attempt to moot the present case, the way will have been opened for the states to apply their own dissonant labor laws to disputes covered by the federal Act.

ARGUMENT

We submit that Chief Justice Warren and Justices Black and Brennan were correct when they declared in *Local No. 8-6, Oil, Etc., Workers Union v. Missouri*, 361 U.S. 363, 372 (dissenting opinion) that the King-Thompson Act is plainly invalid under this Court's decision in *Amalgamated*

* *Rosen, op. cit. supra* note 4, at 395; Note, "State Seizure of Industries," 48 Va. L. Rev. 699 (1962).

⁹ *Missouri v. Pigg*, 362 Mo. 798, 244 S.W. 2d 75 (1951).

Ass'n, Etc. v. Wisconsin, Employ. Rel. Bd., 340 U.S. 383, discussed *supra* p. 5.

As we understand it, the Missouri Supreme Court undertakes to distinguish that case on the ground that under the Missouri statute the governor is authorized "to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest." (§295.180.) Section 2(2) of the Labor Management Relations Act, 1947, excludes from its definition of "employer" "any State"; and §2(3) excludes from its definition of "employee" "any individual employed by . . . any . . . person who is not an employer as herein defined."¹⁰ The federal Act thus does not apply to disputes between a state and its employees, and the court below, though it did not discuss the issue in such mundane terms, evidently regarded the taking of "possession" by the Governor as removing the case from the reach of the federal Act and this Court's decision in *Amalgamated*. We submit that it does not.

1. The issuance of the Governor's executive orders purporting to "take possession" of the Missouri facilities of the Transit Company did not make the State the "employer," or transform the strikers into state "employees."

The Governor issued two executive orders. The first stated that "I hereby take possession of the . . . facilities" of the Transit Company "located in the State of Missouri." (R. 134-135.) The second order directed the Chairman of the State Mediation Board to take possession as the Governor's "agent." (R. 136-137.)

¹⁰ The Wagner Act definition of "employer" was the same in this respect, but the Wagner Act definition of "employee" did not contain the exclusion quoted above. The Taft-Hartley-Conference Report describes the added language as "a clarifying provision." H. Rep. No. 510, 80th Cong., 1st Sess., p. 33.

Nothing else happened. The Company officers and directors continued to manage its business as theretofore, without interference from the Governor, the Chairman of the Mediation Board, or any other state official. The Chairman testified (R. 45):

"So far as I know the company is operating now just as it was two weeks ago before the strike."

The altogether nominal role of the State here is emphasized by the sharply contrasting situation in *United States v. United Mine Workers*, 330 U.S. 258. There the Court concluded (289):

"* * * We hold that in a case such as this, where the Government has seized actual possession of the mines, or other facilities, and is operating them, and the relationship between the Government and the workers is that of employer and employee, the Norris-LaGuardia Act does not apply."

The War Labor Disputes Act, under which the mines were seized, included

"procedures for adjusting wages and conditions of employment of the workers in such a manner as to avoid interruptions in production." (330 U.S. at 285.)

The Executive Order similarly authorized the Secretary of the Interior to negotiate with the union "for appropriate changes in terms and conditions of employment for the period of governmental operation." (330 U.S. at 286.) Pursuant to these authorizations the Secretary negotiated a collective bargaining agreement with the union which "granted substantial wage increases and contained terms relating to vacations" and grievance procedures. (330 U.S. at 286.) The mine owners were not parties to the agreement, or to any of its subsequent modifications, and neither agreement nor modifications were submitted to them for approval.

The Court held, accordingly, that the Government had (330 U.S. at 287):

"substituted itself for the private employer in dealing with those matters which formerly were the subject of collective bargaining between the union and the operators."

Although the regulations of the Coal Mines Administrator declared that the earnings or liabilities of the mines, while under seizure, were those of the owners, and not the Government (330 U.S. at 288), the Court subsequently held that such a seizure is a taking of private property for public use, and that the United States must pay operating losses attributable to wage increases instituted during the seizure. *United States v. Pewee Coal Co.*, 341 U.S. 114.

The contrast with the present situation is marked. The State's seizure "agent," the Chairman of the State Mediation Board, took no action whatever in consequence of the seizure, apart from handing the executive orders to the company officials. (R. 38-45.) Prior to the seizure he had, as Chairman of the State Mediation Board, attended negotiations between the union and the company at the office of the Federal Mediation and Conciliation Service (R. 50-51, 69), and later the State Board, under his chairmanship, had issued public recommendations for settlement. (R. 55.) But with the token seizure, and the injunction against the strike, the Chairman's role with regard to the company's labor relations ended. (R. 45.)

On the occasion of an earlier "seizure" of the same Transit Company, the court below said (*Rider v. Julian*, 365 Mo. 313, 282 S.W. 2d 484, 494-495 (1955)):

"The possession . . . was largely declaratory in nature. It was proclaimed by the governor and again by . . . [the chairman] . . . but actually nothing was done about it. . . ."

"It is apparent from the record, and we so hold, that possession of . . . the state was not intended to be and was not in fact actual possession. Insofar as the possession needs to be identified by name, it might be called a legal possession or a nominal and technical possession. It was more or less the assertion of the right to possession which did not, in this case, ripen into exclusive or actual possession."

A New Jersey chancellor made much the same evaluation of a "seizure" under that State's law: "They did not become employees of the State in any ordinary sense, but only in the peculiar or figurative sense intended by the statute." *Van Riper v. Traffic Tel. Workers*, 142 N. J. Eq. 785, 792, 61 A. 2d 570, 576 (Ch. 1948), *rev'd on other grounds*, 2 N. J. 335, 66 A. 2d 616 (1949).

United Mine Workers is germane to this case only in the limited sense that it serves to contrast actual assumption and exercise by government of the genuine role of an employer with the total absence of any such role. But the United States in *United Mine Workers* adopted the role of employer pursuant to explicit authority conferred by the War Labor Disputes Act. In the face of the contrary legislative determination expressed by Congress in the Taft-Hartley Act, the United States cannot, any more than a state, intervene in a labor dispute even by taking possession of the property and assuming the genuine role of an employer during the period of seizure. This Court explicitly so held in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579. Congress has withheld from both the United States and a state the power to intervene in a labor dispute by seizure whether or not the governmental entity has in actual substance become the employer for the period of seizure. Such seizure is quite different from a situation where a state or municipality during a labor dispute resorts to condemnation of a utility and acquires title to it in order to operate it thereafter, and not solely for the period of the

dispute, as a governmental instrumentality. For in that case the state or city has decided to exercise the power it has to provide transportation services through governmental ownership rather than by private enterprise in the same way that a municipality runs a sanitation department and the United States runs the post office.¹¹ Only in the case of true governmental ownership does it become relevant that the National Act excludes from covered employers "any State or political subdivision thereof" (§2(2)) and from covered employees "any individual employed . . . by any . . . person who is not an employer as herein defined." (§2(3).) These exclusions should not apply, however, where government assumes even the genuine role of an employer but limits its role to a period of seizure brought about by intervention in a labor dispute. Congress did not by these statutory exclusions undo by indirection its decision that recourse to seizure as a labor relations device was incompatible with the national labor policy.

But in any event this case does not bring consideration of the statutory exclusions into play. For here the State did not become the employer for any purpose except to render the strike, it hoped, illegal. So purely formal and nominal a "taking of possession", surely cannot suspend the application of the federal Act. If it could, it would be open to any state or city or town to destroy the rights guaranteed by the federal Act by the easy device of proclaiming that it was "taking possession of" the struck utility or other plant or facility.¹²

If the doctrine were established that a state or municipality may oust the application of the federal Act merely by taking nominal possession of a plant or facility engaged in a labor dispute, the doctrine could hardly be limited to

¹¹ This is what New York City did during a recent bus strike. See Note, "State Seizure of Industries," 48 Va. L. Rev. 699 (1962).

¹² Cf. the statement of Senator Taft, quoted *supra* p. 4.

utilities by any principle of preemption. An easy road would be opened for strike breaking by city councils subservient to employer interests, and there can, unfortunately, be little doubt that municipalities which have heretofore undertaken to ban unions entirely by such devices as licensing ordinances¹³ would be equally ready to employ the device of seizure. The federal Act could become a dead letter through wide reaches of the country.

2. The seizure provisions of the King-Thompson Act are inseparable from other provisions and practices under the Act which conflict with the federal Act.

Seizure is but the ultimate step in the elaborate procedures which the King-Thompson Act creates for dealing with public utility disputes.

The statute begins (§295.010.) by reciting that the possibility of labor strife in utilities is "a threat to the welfare and health of the people"; that utilities "are clothed with public interest";¹⁴ and that "the state's regulation of the labor relations affecting such public utilities is necessary in the public interest."¹⁵

¹³ See, e.g., *Staub v. City of Baxley*, 355 U.S. 313. The union's brief in that case listed a number of such licensing ordinances. Southern municipalities continue to enact these ordinances, even in the teeth of the *Staub* decision. A usual practice is to enforce the ordinance long enough to blunt the union organizing drive, but to repeal the ordinance and drop pending prosecutions prior to appellate review. Union attempts to enjoin enforcement (e.g., *Euqui v. United Steelworkers*, 253 F. 2d 594 (6th Cir. 1958)), have foundered on *Douglas v. Jeanette*, 319 U.S. 157.

¹⁴ This terminology is like that of the Kansas Court of Industrial Relations Act, held unconstitutional in *Chas. Wolf Packing Co. v. Court of Industrial Relations*, 262 U.S. 522. However, the Kansas Act declared not merely utilities but certain manufacturing and mining operations "to be affected with a public interest."

¹⁵ Under this Court's decision in *Amalgamated Ass'n, Etc. v. Wisconsin Employ. Rel. Bd.*, 340 U.S. 383, it is precisely state "regulation of the labor relations" of utilities covered by the federal Act that is preempted.

A State Board of Mediation is established to administer the Act. (§295.030.)

Collective bargaining agreements between unions and utilities are required to be reduced to writing and to continue for not less than one year. Thereafter an agreement is to continue in effect from year to year, unless one or both parties informs the other in writing of the specific charges proposed, and also files a copy of such demands with the State Board of Mediation at least 60 days before termination. (§295.090.)¹⁶

These provisions conflict in several respects with the federal Act. Under the federal Act a collective bargaining agreement must be reduced to writing if either party so requests (§8(d)); but there is no absolute requirement that it be in writing. The federal Act contains no provisions as to minimum duration of contracts or automatic renewal. Section 8(d) of the National Labor Relations Act requires the giving of written notice of proposed termination or modification to the other party to the contract 60 days prior to termination, and of 30 days notice to the Federal Mediation and Conciliation Service and to any State mediation agency. It does not require any service of proposed, written changes upon the other party, or upon any mediation agency.

The King-Thompson Act goes on to provide (§295.080.1) that upon receipt of a notice the State Mediation Board shall step into the picture. As the Chairman put it, in the present case the notices were filed "and in that manner the Act took jurisdiction of this dispute." (R. 46.) The Board may convene a conference between the parties upon the request of either party or upon its own motion, and it shall be the duty of the parties to attend "and to continue

¹⁶ These provisions were complied with. (R. 46.)

in such conference until excused by the board:" (§295.080.3.)

This last requirement is likewise probably invalid as in conflict with the federal Act. Section 8(d)(3) of the National Labor Relations Act evidently contemplates that a state mediation service may play some role in the mediation of disputes subject to the federal Act. Section 202(c) of Taft-Hartley provides for the cooperation of the Federal Mediation and Conciliation Service with state and local mediation agencies; and §203(b) directs the Federal Service to stay out of disputes having only a minor effect on interstate commerce, if state or other conciliation services are available.

However, even the Federal Service is not given any power to force mediation upon the parties, but only to make "available" or "proffer" its services. (§§201(b) and (c), §203(b).) The federal Act provides that employers and unions shall participate fully and promptly in such meetings as may be undertaken by the Federal Service (§204(a)), but has no provision for enforcement of this obligation. The King-Thompson Act, on the other hand, provides (§295.200.6) for enforcement of all of its provisions by injunction. Thus in essence the federal Act provides for voluntary mediation while the state Act provides for compulsory mediation.

The provision that the parties must continue in conference with the State Board until excused by it obviously might interfere with the functioning of the Federal Mediation Service, or with the parties' own negotiations. In the present case the union objected to the continued participation in the negotiations, and in the mediation efforts of the Federal Service, of the Chairman of the State Board, but the Chairman insisted on it. (R. 49:)

In *Missouri v. Pigg*, 362 Mo. 798, 244 S.W. 2d 75 (1951) the court below held that this first portion of the King-

Thompson Act (i.e., §§295.010-295.080) was not in conflict with the Labor Management Relations Act of 1947 which, the court said, contemplates the existence of state boards and cooperation with them. (See R. 178-179.) However, as noted, these provisions conflict with the national Act in numerous respects.

In *Missouri v. Local 8-6, Oil, Etc., Workers Union*, 317 S.W. 2d 309 (Mo. 1958), *vacated as moot*, 361 U.S. 363, the court below further held that these preliminary sections are severable from and could stand independently of the remainder of the Act. (See R. 179.) However that may be, the converse does not follow. The validity of the seizure can hardly be adjudged in isolation from the steps that led up to it.

The King-Thompson Act provides that if the utility and the union do not execute a final agreement in writing disposing of the dispute before the termination date of the contract, or agree to arbitration, each shall designate a member of a public hearing panel, and these two members shall choose a third. (§295.120.) This public hearing panel is to hold public hearings and render a report (§295.120.2), containing a resume of the evidence and the panel's recommendation for settlement. (§295.150.) If either party to the dispute refuses or fails to designate a panel member, the State Board of Mediation is authorized to appoint the panel members. (§295.160.)

In the present case a variation on these statutory procedures was employed. When the negotiations reached an impasse, the Chairman of the State Board urged the union not to strike and proposed that it submit the matter to a public hearing panel. (R. 52.) Then he proposed that it be submitted to the full membership of the State Board of Mediation. (R. 52.) The union declared that it would participate only if the Board would agree that the proceed-

ings would not be public and that the Board would not make any recommendations for settlement. (R. 52-53.) The Chairman rejected these conditions (R. 52-53), and the Board then proceeded to take the matter up in camera and rendered a report and recommendations for settlement. (R. 54-55.) Apparently neither party accepted the recommendations (R. 55-56), and the executive orders taking "possession" of the facilities of the Transit Company in Missouri followed.

The King-Thompson Act provides that if either the utility or the union refuses to accept and abide by the recommendations made pursuant to the Act, so that a strike results or threatens, "or should either party . . . engage in any strike," the governor is authorized to take possession of the facility. (§295.180.)

Although seizure is the ultimate step in the processes established by the Act, i.e., notices, mandatory mediation, and hearing panel with recommendations for settlement, and is triggered by rejection of the recommendations for settlement, as the Act is written the governor apparently may resort to seizure whenever a strike transpires, even though none of these preliminaries have taken place.

If there were a seizure without any preliminaries, it may be that its validity could be adjudicated without reference to the remainder of the Act.

Here, however, the preliminary procedures were utilized. The notice requirements, though they conflict with the federal Act, were complied with. The Chairman of the State Board attempted mediation, and insisted on his right to be present at negotiations even over the union's objection. Finally, again over the union's objection, the State Board of Mediation rendered a report and recommendations for settlement. It was only after these preliminary proceedings, and the rejection of the recommendations,

that seizure ensued. We submit that it cannot be judged apart from them.

A much more narrowly drawn Massachusetts statute, which did not forbid strikes, but simply empowered the State Board of Conciliation and Arbitration to mediate, to conduct hearings, and to render a report apportioning blame and recommending terms of settlement, was held invalid as in conflict with the federal Act in *General Electric Co. v. Callahan*, 294 F. 2d 60 (1st Cir. 1961). The court enjoined the State Board from proceeding with its hearing. In its opinion, by Chief Judge Woodbury, it declared (p. 67):

"Mere participation in State Board hearings will surely have some tendency to solidify positions taken at the bargaining table thereby making it more difficult later to modify or abandon a stand taken on a bargaining issue in favor of an amicable settlement. Moreover, having held a hearing, the Board is not limited to editorial comment. Nor are its functions merely to mediate and conciliate. Its function after investigating a labor controversy is to render a written decision to be made public and be open to public inspection advising the parties as to what they should do to end the controversy and ascertain which of the parties is 'mainly responsible or blameworthy' for its existence. The obvious statutory purpose is to coerce agreement by invoking official action to mold public opinion with respect to a labor dispute to the end of bringing the pressure of public opinion to bear to force a settlement. This is quite contrary to the national policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at after 'good faith' bargaining between the parties. The conflict between state and federal policy is obvious."

We submit that the Court of Appeals is wholly correct as to a conflict between state and federal policy.

At every turn the federal Act makes clear its policy against any government coercion with respect to the terms of settlement.

Section 8(d) of the National Labor Relations Act, which defines the duty to bargain collectively, declares: "[B]ut such obligation does not compel either party to agree to a proposal or require the making of a concession * * *."

The policy against government pressure as to the terms of settlement applies even to national emergency disputes. A board of inquiry appointed to inquire into such a dispute is to make a report of the facts, but the Act provides that the report "shall not contain any recommendations." (§206.) Again, the statute declares that it is the duty of the parties, following the issuance of the 90-day injunction, to make every effort to settle their differences with the assistance of the Federal Mediation and Conciliation Service. But the statute then declares: "Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service." (§209(a).)

The provisions of the Missouri statute for mandatory mediation and for recommendations by a public board, to be followed by seizure if the recommendations are not accepted, are thus wholly inconsistent with the federal Act and must yield to it.

The inference should not be left that it is only unions that oppose compulsory arbitration and other forms of government coercion as to the terms of settlement.

The Taft-Hartley provisions quoted above are in precise accord with the views of Senator Taft quoted *supra* p. 4, and the Senator was hardly a spokesman for the labor movement.

It was the General Electric Company, not the union, that sued to enjoin the Massachusetts board from proceeding with its hearing.

The New York Chamber of Commerce has very recently expressed views similar to those in this brief. In a telegram to Governor Rockefeller the Chamber declared (BNA Daily Labor Report, Feb. 5, 1963, p. A-6):

"We wire to record our vigorous opposition to the bill to establish a commission of public concern to act in labor disputes in New York State. Our reasons are these:

"The creation of a standing commission will encourage governmental intervention in labor disputes in which no real threat to public health, safety or welfare exists and which the parties should be permitted to settle for themselves.

"The prospect of governmental intervention, which is inherent in the creation of a standing commission, causes both parties to conceal the full extent of their willingness to compromise. Thus the settlement which the union would be ready to accept, and which perhaps the employer might be willing to pay, stands unrevealed during the bargaining because of the tendency of mediating panels to split the difference existing at the time the panel enters the dispute. In short, it undermines free collective bargaining.

• • •

"The creation of a standing commission would be a long step on the road to compulsory arbitration of labor disputes. It would strike a blow at free collective bargaining. It would take us down the path to government fixation of wages and prices.

• • •

"Moreover, there is grave doubt whether the state may forcibly inject itself into such labor disputes involving interstate commerce in view of the preemption of this area by federal law."

CONCLUSION

For the foregoing reasons and for the reasons stated in the brief for appellants, we submit that the judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

J. ALBERT WOLL
General Counsel, AFL-CIO

ROBERT C. MAYER

THEODORE J. ST. ANTOINE
815 Fifteenth Street, N.W.
Washington 5, D. C.

THOMAS E. HARRIS
Associate General Counsel,
AFL-CIO

815 Sixteenth Street, N.W.
Washington 6, D. C.

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Supreme Court of the United States
OCTOBER TERM, 1962

No. 604

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF
STREET, ELECTRIC RAILWAY AND MOTOR COACH
EMPLOYEES OF AMERICA, ET AL., *Appellants*

v.

STATE OF MISSOURI, *Appellee*

On Appeal From the Supreme Court of Missouri

BRIEF FOR APPELLANTS

BERNARD CUSHMAN
5025 Wisconsin Avenue, N. W.
Washington, D. C.

BERNARD DUNAU
912 Dupont Circle Building
Washington 6, D. C.

JOHN MANNING
3333 Warwick Boulevard
Kansas City, Missouri

Attorneys for Appellants

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

No. 604

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF
STREET, ELECTRIC RAILWAY AND MOTOR COACH
EMPLOYEES OF AMERICA, ET AL., *Appellants*

v.

STATE OF MISSOURI, *Appellee*

On Appeal From the Supreme Court of Missouri

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Missouri Supreme Court is reported at 361 S.W. 2d 33 (R. 158-193). No opinion was written by the Circuit Court of Jackson County, Kansas City, Missouri. The opinion of a three-judge federal district court in a proceeding pertaining to the

same controversy as the instant one, expressing that court's decision to abstain from adjudication of the federal questions presented on this appeal in deference to initial state determination, is reported at 50 LRRM 2942 and is reprinted in the Jurisdictional Statement at pages 45a-54a.

JURISDICTION

The Missouri Supreme Court affirmed as modified an injunction issued by the Circuit Court of Jackson County, Kansas City, Missouri, restraining a strike in a proceeding brought in accordance with the procedure prescribed by a Missouri statute known as the King-Thompson Act. The final judgment of the Missouri Supreme Court was entered on October 8, 1962 (R. 198). Notice of appeal was filed in that court on October 18, 1962 (R. 199). The Jurisdictional Statement was filed in this Court on November 20, 1962, and probable jurisdiction was noted on January 14, 1963 (R. 202). The jurisdiction of this Court to review by appeal the judgment of the Missouri Supreme Court is conferred by 28 U.S.C. § 1257(2).

STATUTES INVOLVED

The King-Thompson Act, (Ch. 295, Rev. Stat. Mo., 1949) is set out in full in Appendix A (*infra*, pp. 1a-11a). Relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 316, 29 U.S.C. § 141, *et seq.*) are set out in Appendix B (*infra*, 12a-19a).

QUESTIONS PRESENTED

1. Whether the King-Thompson Act, which establishes a special type of compulsory hearing, fact-finding, and recommendation procedure applicable to labor disputes in privately owned public utilities and

which makes "unlawful" "any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state. . . . as a means of enforcing any demands against the utility or against the state," is in conflict with and pre-empted by the Labor Management Relations Act, 1947.

2. Whether the King-Thompson Act, by prohibiting a public utility strike without substituting a compensating equivalent for it, offends substantive due process in violation of the Fourteenth Amendment of the United States Constitution and imposes involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution.

STATEMENT

After an impasse had been reached in collective bargaining negotiations between appellant Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America (herein called the Union) and Kansas City Transit, Inc. (herein called the Company), the transit employees voted to and went on strike to cause the employer to accede to their terms. Upon the basis of the threatened strike, the Governor of Missouri invoked the King-Thompson Act and took possession of the property of the Company; after the strike began an injunction to restrain its continuance was sought and obtained in accordance with the injunctive procedure of the King-Thompson Act. The federal questions presented on this appeal were first raised in the Circuit Court of Jackson County by motion to dismiss (R. 8-11), in the answer (R. 131-132), and at the trial (R. 122), and were thereafter urged on appeal to the Mis-

souri Supreme Court (Br. pp. 2, 12-46).¹ The underlying subsidiary facts, relevant to appellants' claim that the King-Thompson Act is invalid on federal grounds, may be summarized as follows:

A. The Interstate Business of Kansas City Transit, Inc.

The Company is a Missouri corporation with its principal office and place of business at Kansas City, Missouri. It transports passengers by bus in the States of Kansas and Missouri. It operates under a certificate of convenience and necessity issued by the Public Service Commission of Missouri and a like certificate issued by the Kansas State Corporation Commission. (R.13.)

The Company has "one line that operates exclusively in the State of Kansas; . . . certain lines that operate exclusively in the State of Missouri; and then the rest of the lines are interstate operating between both states" (R. 13). The Company's annual revenue received from the bus transportation of passengers approximates \$8,600,000 (R. 14). Of this sum, 77 per cent is derived from transporting passengers wholly within the State of Missouri, 7 percent is derived from transporting passengers wholly within the State of Kansas, and 15 percent is derived from transporting passengers between Missouri and Kansas (R. 14). On a normal work day the average number of passengers carried by the Company on the total system is about 150,000 (R. 14). Of this number, 115,000 travel exclusively within Missouri, 10,500 travel exclusively

¹ "Br." refers to the brief filed by appellants in the court below. All briefs in the court below and a letter submitted in lieu of a reply brief have been certified by the clerk of the court below and transmitted to the clerk of this Court.

within Kansas, and 24,500 travel interstate between points in Kansas and Missouri (R. 16).

The total round trip route miles of the Company's passenger transit system are about 496 miles (R. 16). 415 of these route miles are located in Missouri and 81 in Kansas (R. 16). Of the total round trip mileage, 150 round trip miles constitute continuous interstate routes running between Kansas and Missouri, 330 round trip miles constitute routes running exclusively within Missouri, and one route of 16.78 round trip miles runs exclusively within Kansas (R. 17-18, 29-30). The Company owns 401 busses (R. 18). It operates 104 on the interstate routes, 234 on routes exclusively within Missouri, and eight on the route exclusively within Kansas (R. 18-19).

Of the Company's total employment of 950 persons, 817 are within the bargaining unit represented by the Union (R. 20, 30). Of the employees within the bargaining unit, 640 are bus drivers and 170 are maintenance employees (R. 18, 20). 665 live in Missouri and 150 in Kansas (R. 74). The bus drivers are part of the transportation department comprised of two divisions, both located in Kansas City, Missouri; the maintenance employees are part of the maintenance department, comprised of a garage and shop, each located in Kansas City, Missouri (R. 19-20). Whether the bus driver operates an interstate route, a Kansas route, or a Missouri route, he reports to work and begins his journey at one of the two divisions at Kansas City, Missouri (R. 19-20). Busses are not assigned to a particular route but operate interchangeably on all routes; maintenance of busses is similarly not segregated; a maintenance employee can work on any bus (R. 20).

In addition to scheduled bus transportation, the Company charters busses to persons for use on special occasions, from which it derives an average monthly revenue of four or five thousand dollars; while not exclusively so, charter service operates interstate (R. 21). Furthermore, before June 1957, the Company operated a freight switching service; since that time the Company contracts with another party to operate that service, from which the Company derives a monthly revenue of four or five hundred dollars; two interstate railroads are served by the switching connections (R. 22-23).

The Company annually spends about \$1,450,000 for fuels, materials and supplies (R. 23). Much of these have an extrastate origin (R. 23-24). All of the 401 busses owned by the Company were manufactured in states other than Kansas or Missouri and were delivered to the Company in Missouri from other states (R. 24).

The National Labor Relations Board has found, and the Company in the proceeding before the Board has admitted, that the Company "is engaged in commerce within the meaning of the National Labor Relations Act." *Kansas City Public Service Co.*, 47 NLRB 1, 2.³

B. The Labor Dispute and the Prohibition of the Strike

The employees represented by the Union in collective bargaining consist basically of bus operators, mechanics, service men, and cleaners and janitors (R. 66). The National Labor Relations Board on February 19, 1943 certified the Union as the representative

³ Kansas City Transit, Inc., is the same business entity that was formerly known as Kansas City Public Service Company. The change of name took place about May 25, 1960. (R. 12-13.)

of these employees and others within a defined bargaining unit, and the Union has been their representative from that time (R. 66, 138-142). The Company and the Union entered into their first collective bargaining agreement in 1943, and agreements between them have since existed (R. 67).

The most recent agreement was for a term from November 1, 1959 through October 31, 1961 (R. 67, def. ex. 5, p. 3). On August 15, 1961, the Company notified the Union of its desire to terminate the agreement (R. 68). On August 30, 1961, the Union notified the Company of its desire to negotiate changes in the agreement, and identified the changes it proposed (R. 67). The Union sent copies of its notification to the Federal Mediation and Conciliation Service and to the Missouri State Board of Mediation (R. 67-68). On September 29, 1961, the Union filed a notice of dispute with the Federal Mediation and Conciliation Service, Missouri State Board of Mediation, and the Kansas Department of Labor (R. 68). The sixty-day notice of proposed changes sent to the Company and the thirty-day notice of dispute sent to the federal and state agencies were dispatched in accordance with the requirements of section 8(d)(1) and (3) of the Labor Management Relations Act, 1947.

Negotiations between the Company and the Union began on September 19, 1961 (R. 68). An impasse was reached about October 13, 1961 (R. 68). The subjects in dispute were wages, vacations with pay, group insurance, pensions, disability allowances, sick leave, a different system of work day for all maintenance employees, a profit sharing plan, a cost of living plan, and others (R. 68-69). On October 19, 1961, the Federal Mediation and Conciliation Service began to attempt

to mediate the dispute and negotiations since then have been conducted with its assistance (R. 69).

On October 30, 1961, with the federal mediators present, the Chairman of the Missouri State Board of Mediation attended the negotiation session scheduled for that day and he continued thereafter to sit in on the negotiations (R. 69, 49-50). On October 31, 1961, the Governor of Missouri wired the Union urging it to "accept the services of the full membership of the State Board of Mediation forthwith to hear the most important issues and make recommendations for settlement" (R. 143, 70). On November 1, 1961, the Union wired its response, informing the Governor of its willingness to "accept the mediation efforts" of the state agency "provided that such efforts do not include hearings which result in recommendations" (R. 143, 70). On November 6, 1961, the Chairman of the State Board notified the Company and the Union of his intention to assemble the full Board, and on November 8, 1961, the Board convened (R. 69, 52). Orally and in writing, at the meeting of November 8, the Union stated that, as ground rules for a successful proceeding, the State Board should act in a mediatory capacity only, "without any hearing of a public nature" and without "recommendations, public or otherwise" (R. 69-71, 52-54, 144-146). The Union "has always felt that negotiations cannot be properly conducted in the newspapers or in the public" (R. 70). The State Board declined to commit itself to the method of proceeding requested by the Union, and the Union then withdrew from participation in the meeting of November 8 (R. 70-71, 52-54, 144-146). Thereafter, on November 11, 1961, the State Board issued a public written recommendation for settlement, proposing a wage increase

only, all other unresolved issues to be dropped (R. 54-56).

Meanwhile, on October 31 and November 1 and 2, an impasse having been reached in negotiations and the Company having refused to arbitrate the unsettled issues (R. 71, 52, 47-48), the Union conducted a strike vote by secret ballot (R. 71). Of the 817 employees eligible to vote, 775 cast ballots, 681 voting for the strike, 74 against, and two ballots were blank (R. 71). The 42 who did not vote failed to do so because they "were home sick in bed or in the hospital or out of town on vacations" (R. 72).

Section 295.180 of the King-Thompson Act provides that the Governor of Missouri is authorized "to take immediate possession" of a public utility, "after his investigation and proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of . . . a threatened or actual strike, . . . and that the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility. . . ." *Infra*, pp. 8a-9a. In accordance with this provision, on November 13, 1961, the Governor issued a proclamation that the threatened strike against the Company required him to exercise his authority to take possession of it in order to assure its operation (R. 132-133, 37). On the same date, the Governor issued Executive Order No. 1 stating that "I hereby take possession of the plants, equipment, and all facilities of the Kansas City Transit, Inc., located in the State of Missouri, for the use and operation by the State of Missouri in the public interest, effective at 11:59 o'clock, P.M., Central Standard Time, Monday,

November 13, 1961" (R. 134-135, 37). Still the same day, the Governor issued Executive Order No. 2, designating the Chairman of the Missouri State Board of Mediation as his agent to take possession (R. 136-137, 37). Section 295.200.1 of the King-Thompson Act makes "unlawful," after a utility has been "taken over," "any strike or concerted refusal to work . . . as a means of enforcing any demands against the utility or against the state." *Infra*, pp. 9a-10a.

At midnight November 13, 1961, the Union struck the Company and picketed its various premises (R. 72). The strike and picketing were discontinued in the evening of November 15, 1961, as a result of the issuance by the Circuit Court of Jackson County, Kansas City, Missouri, of a temporary restraining order, continued in effect after trial pending final decision (R. 127), enjoining "any work stoppage, refusal to work and strike against the State of Missouri or Kansas City Transit, Inc." (R. 7, 72). During its continuance the strike and picketing had been peaceful (R. 72).

On two occasions previous to 1961, the Governor of Missouri, pursuant to the King-Thompson Act, took possession of the Company as a result of a threatened strike by the Union (R. 73). The period of seizure on the first occasion lasted from April 1950 to December 11, 1950, and on the second from November 6, 1957 to March 6, 1958 (R. 73). No actual strike occurred at either previous time after possession was taken (R. 73-74).

C. The Character of the Possession of the Company Taken by the State of Missouri

Possession of the Company consisted of the performance of no acts other than the delivery to its President of the Governor's Proclamation and Executive Orders No. 1 and 2 (R. 38-39). Executive Order No. 2 provides in part that "All rules and regulations of the aforesaid utility governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of Missouri" (R. 137, 37).

The employees of the Company are not, and will not be, employees of Missouri (R. 39, 62-65). The employees are not paid by Missouri; Missouri does not contribute to their social security or unemployment compensation benefits; Missouri does not pay their workmen's compensation claims (R. 39-41). These payments are made by the Company (*ibid.*). Missouri does not direct the employees as what to do or where to report for work (R. 41-42); it does not hire, discharge, or discipline them (R. 42); it does not control any aspect of the employment relationship or consult with the Company concerning it (R. 42).

Missouri does not and is not authorized to expend any of the Company's money (R. 43). Missouri does not possess the Company's bank accounts, sign its checks, or collect its revenue (R. 43-44). No reports are made to Missouri, and none have been requested, concerning the Company's receipt of its funds (R. 44). Missouri does not make purchases for the Company or pay its bills (R. 44). No property of the Company was actually conveyed, transferred, or otherwise turned over to Missouri (R. 44).

Missouri does not participate in the management of the Company; Missouri is not consulted by the Company's Board of Directors or officers as to the conduct of the business (R. 44-45). Management of the Company remains exclusively with its officers and Board of Directors (R. 45). There has been no change of any kind in the conduct of the business by the Company (R. 45).

D. The Character of the Actual and Apprehended Jeopardy to the "Public Interest, Health and Welfare" as a Result of the Strike Against the Company

During the two-day strike, the Mayor of Kansas City, Missouri, called for group riding in private cars (R. 109), and maximum occupancy of taxicabs (R. 110). Most people got to work (R. 102, 29). The judgment of responsible police officials on the flow of traffic was that "We had a few problems as we usually do but they were straightened out quickly. We had traffic supervisors in the field all over the city watching the situation. They reported that everything seemed to be moving smoothly. The principal tie-ups occurred again briefly in the vicinity of 31st and Main Streets and at 31st and The Paseo but we had enough men assigned to those areas that we got things moving quickly. We kept extra traffic patrolmen on duty" (R. 120-121). Had the strike continued the City would have eased any traffic problem by requesting institution of a system of staggered hours by which business firms release employees from duty at different times (R. 110, 101, 95).

In answer to the question, "Would you say, sir, that the primary economic effect [of a transit strike] would be upon retail sales in the downtown area of Kansas

City?", the Mayor of Kansas City, Missouri, replied (R. 113):

That is definitely correct. It would be advantageous to shopping centers; it would certainly hurt the hard core of the city which is known as downtown Kansas City, our large stores doing a retail business. I do not think that a transit strike would in anyway affect distribution or wholesale in any fashion, only in minor ways. [See also, R. 84, 85-86, 87-91, 95, 108.]

The Mayor further stated that "Police stations would continue to operate; hospitals would continue to operate; fire stations would continue to operate . . ." (R. 114). Approximately normal functioning of public utilities like light, gas, and telephone could be expected (R. 114). And the Mayor concluded that industrial plants, barring inconvenience, would operate substantially normally (R. 114).

E. The Injunction Issued by the Circuit Court and Its Affirmance by the Missouri Supreme Court

The petition for injunction was filed with the Circuit Court of Jackson County on November 15, 1962 (R. 1-6). The temporary restraining order enjoining the continuance of the strike was entered the same day (R. 7). Trial of the prayer for a temporary injunction was set for November 27, 1962 (R. 7), and on that day appellants filed their motion to dismiss (R. 8-11). Trial was held on November 27 and 28 (R. 7, 65). On November 28, the temporary restraining order was continued in effect pending further order (R. 127). On December 7, appellants filed their answer (R. 129-132). On December 23, the parties stipulated that the evidence received at the preceding trial "may be considered by the court on both the temporary and permanent

injunction" (R. 127). On February 12, 1962, the Circuit Court entered its decree adjudging that appellants "be . . . permanently enjoined and restrained from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri" (R. 128). On appeal the Missouri Supreme Court on October 8, 1962 adjudged that the decree "be modified so that the trial court retains jurisdiction of the cause, and as modified, be in all things affirmed, and stand in full force and effect . . ." (R. 198).³

³ Not sought or suggested by the parties or *amici curiae*, the court below *sua sponte* modified the judgment to state "that the trial court retains jurisdiction of the cause. . . ." Retention of jurisdiction by the trial court was ordered "so that it may modify its decree with changing facts and conditions . . ." (R. 193). The court below stated that, upon a showing that changed circumstances had eliminated the "emergency," appellants could apply to the Governor of Missouri to release the utility from seizure and apply to the trial court to modify the judgment if the Governor denied relief (R. 183-184, 185). Appellee contends that the judgment is therefore not final (motion to dismiss appeal, pp. 4-7). For the reasons stated at page 13, note 2 of the Jurisdictional Statement and in the brief in opposition to the motion to dismiss the appeal, express retention of jurisdiction to modify a permanent injunction upon a showing of changed circumstances simply articulates the inherent power of modification which exists even when unexpressed and of course does not detract from the finality of the judgment. Furthermore, even if it were accurate to describe the injunction as temporary, since the question at issue goes to the power of the court to enter it (see *In re Green*, 369 U.S. 689), the judgment is in any event final and reviewable as the definitive assertion of the court's power to deal with the subject matter. *Local No. 438 Construction & General Laborers' Union v. Curry*, 31 U.S. Law Week 4143 (S. Ct. Jan. 21, 1963). Lastly, finality exists for the further reason that there is nothing more to be decided. *Ibid*.

SUMMARY OF ARGUMENT

I

The question whether the King-Thompson Act conflicts with and is preempted by the Labor Management Relations Act, 1947, was before this Court in *Local No. 8-6, Oil, Chemical & Atomic Workers Union v. Missouri*, 361 U.S. 363. The Court in that case did not reach the merits of the question because it concluded that the controversy had been mooted. In dissenting from this disposition, Mr. Chief Justice Warren, Mr. Justice Black, and Mr. Justice Brennan stated that the "wrongfulness in holding the case moot is emphasized by our belief that the state court was plainly without any jurisdiction over this controversy unless this Court wants to overrule *Amalgamated Association S.E.R.M.C.E. v. Wisconsin Employment Relations Board*, 340 U.S. 383, and adopt the views of the three dissenters in that case. We would follow that holding and reverse this case on the merits." 361 U.S. at 372.

Collective bargaining with the right to strike at its heart is the essence of the federal scheme. In contrast, section 295.200 of the King-Thompson Act makes "unlawful" "any strike or concerted refusal to work for any utility or for the state after any plant, equipment, or facility has been taken over by the state . . . as a means of enforcing any demands against the utility or against the state." The section could not more bluntly identify its point of conflict with the National Act. It prohibits a strike as a means of enforcing demands. As the Court said of the Wisconsin Act in *Amalgamated Association*, so it may be said with precise parity of the King-Thompson Act, "It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in indus-

tries covered by the Federal Act, has forbidden the exercise of rights protected by § 7 of the Federal Act." 340 U.S. at 398.

The validity of the King-Thompson Act is not saved by invoking the public character of a utility or calling the statute "strictly emergency legislation. . . ." *Infra*, p. 33. The identical plea was made but did not avail in *Amalgamated Association*. The transit company in Milwaukee is no less a utility than the transit company in Kansas City. A transit strike in Milwaukee is no less emergent than a transit strike in Kansas City. This Court in *Amalgamated Association* expressly ruled that the National Act does not allow "separate treatment for public utilities," pointing out that "Creation of a special classification for public utilities is for Congress, not for this Court." 340 U.S. at 391-393. And the explicit alternative ground of decision in *Amalgamated Association* rejected state intervention under the rubric of an "emergency." 340 U.S. at 394. There can hardly be a legal difference between a strike interrupting surface transportation in Milwaukee, as in *Amalgamated Association*, and a strike interrupting surface transportation in Kansas City, as in this case.

Nor is the King-Thompson Act saved by the parallel plea that it "is not a comprehensive code for the settlement of labor disputes in utilities as the Wisconsin Act appeared to be." *Infra*, p. 41. First of all, whether comprehensive or cursory, the state enactment falls if it conflicts with the National Act. In any event, the King-Thompson Act is not meaningfully less comprehensive than its Wisconsin counterpart. Its embracing character is marked by its very declaration of policy asserting that "the state's regulation of labor relations affecting such public utilities is necessary in

the public interest" (§ 295.010). Passing all other indicia, the King-Thompson Act establishes a special type of compulsory hearing, fact-finding and recommendation procedure applicable to labor disputes in public utilities. This procedure itself conflicts with the National Act. Thus, the essence of the federal scheme for mediation and conciliation is voluntarism—that the mediation and conciliation methods employed shall be acceptable to the parties and not forced on them. In contrast, the King-Thompson Act empowers the State Mediation Board to "take whatever steps it deems expedient to bring about a settlement of the dispute" (§ 295.080); the parties are to remain in "conference until excused by the board or its representatives" (*ibid.*); and a "public hearing panel" is ordained to which recourse is obligatory and which hears the dispute, finds the facts, and recommends settlement terms (§§ 295.120-295.180). As the Court of Appeals for the First Circuit stated in invalidating a Massachusetts statute similarly based on an activist method of dispute settlement, so here, the "obvious [state] statutory purpose is to coerce agreement by invoking official action to mold public opinion with respect to a labor dispute to the end of bringing the pressure of public opinion to bear to force a settlement. This is quite contrary to the national policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at after 'good faith' bargaining between the parties. The conflict between the state and federal policy is obvious." *General Electric Co. v. Callahan*, 294 F. 2d 60, 67 (C.A. 1).

A "main" difference identified to save the validity of the King-Thompson Act is that "the Wisconsin Act provided for compulsory arbitration while the

King-Thompson Act does not." *Infra*, p. 48. But the absence of compulsory arbitration worsens the conflict with the National Act. Both statutes prohibit a utility strike and both therefore geld collective bargaining by depriving the union of the capacity to exert economic pressure to back its demands. The Wisconsin Act at least sought to rectify the imbalance it created by providing compulsory arbitration as a substitute for the strike. While this nullifies the freedom of the parties to work out the terms of their agreement for themselves, it does not subject the employees to the practical necessity of accepting the employer's terms for lack of means to induce him to yield more favorable conditions. And, as between terms impartially determined by a disinterested body and terms which an employer can unilaterally dictate because he can act without apprehension of a strike, the former more nearly harmonizes with the federal objective of "restoring equality of bargaining power between employers and employees" (LMRA, Title I, § I, 14). And so, in prohibiting the strike without providing a compensating equivalent to substitute for it, the King-Thompson Act worsens the conflict with the National Act.

The reason overridingly stressed to support the validity of the King-Thompson Act is that the strike is prohibited only in conjunction with possession of the utility by the State. Utilization of seizure to signal prohibition of the strike does not save the statute. Congress canvassed and rejected seizure as an appropriate regulatory method.

This Court settled the question in *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, when it held that the President had no constitutional power to seize the steel mills to avert a national emergency, and

premised this conclusion in significant part on the fact that Congress in the Taft-Hartley Act had withheld seizure authority from the President even in national emergency strikes. Writing for the Court, Mr. Justice Black explained that (*id.* at 586):

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances.

The power to seize which Congress withheld from the President to avert a national emergency it did not grant to a State Governor to avert a local emergency. No less than other short cuts to industrial peace, seizure "was rejected by Congress as being inconsistent with its policy in respect to enterprises covered by the federal Act, and not because of any desire to leave the states free to adopt it." *Amalgamated Association*, 340 U.S. at 395. As summarized by Senator Taft, the architect of the Labor Management Relations Act, 1947, upon whose views this Court strongly relied in *Amalgamated Association*, "We did not feel that we should put into law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel

that it would interfere with the whole process of collective bargaining." 340 U.S. at 395, n. 21 (emphasis supplied).

Three times since this Court's decision in *Amalgamated Association* bills have been introduced, which Congress has by vote affirmatively refused to enact, designed to overrule that decision by amending the National Act to authorize state laws prohibiting or regulating strikes by public utility employees. Rejection by Congress took place in 1954, 1958, and 1959. Congress has thus ratified the rule of *Amalgamated Association* and again affirmed that public utility employees may not be subjected to state laws which deny or curtail the right to strike or to bargain collectively as guaranteed by federal law. Congress has left no room for the King-Thompson Act.

II

The King-Thompson Act offends substantive due process in violation of the Fourteenth Amendment of the United States Constitution. The vice stems from the statute's prohibition of a public utility strike without providing a compensating equivalent to substitute for the strike. The occasion for prohibition of the strike is seizure of the utility upon the Governor's determination that an actual or threatened strike jeopardizes the public interest, health and welfare. Barring superseding federal law or the independent operation of the Commerce Clause, one may grant a valid state interest in safeguarding the community from imminent jeopardy caused by interruption of utility services. But protection of that interest, if it can justify it at all (see *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522), can justify abolition of the strike

only if a compensating equivalent is substituted for the strike. It cannot justify relegation of the public utility worker to economic servility by depriving him of the right to strike and giving him nothing in place of it. As stated by Mr. Justice Brandeis, the legislature, "while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." Dissenting in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 448. But a fatal defect in what Missouri has done is that it has not substituted "processes of justice." It has forbidden the fight, and left the field to the employer. A statute is arbitrary and capricious, and therefore unconstitutional, when it sacrifices the interest of the employees in a fair wage and working conditions by depriving them, without any compensating equivalent, of their only effective weapon in the competition over the division of the joint product of capital and labor.

The same consideration shows the statute's imposition of involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution. For to prohibit utility employees from striking, without substituting a compensating equivalent for the strike, brings about precisely the situation where "the master can compel and the laborer cannot escape the obligation to go on," with the result that "there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." *Pollack v. Williams*, 322 U.S. 4, 17-18. In the industrial world of the twentieth century this is involuntary servitude. It is no answer to say that the statute does not prohibit the worker from quitting. He can quit only if there is other work he can find.

And the employee with substantial service with the employer can quit only if he is willing to surrender his equity in his seniority and start from scratch with another enterprise. The freedom to quit is therefore hollow. The hard fact is that employees who are prohibited from striking are compelled by economic exigency to stay on the job on the employer's terms. This is involuntary servitude in today's world.

III

Under date of December 28, 1962, the Governor of Missouri issued an Executive Order vacating the seizure of the property of the Company "effective at 11:59 P.M. o'clock, on Saturday, January, 12, 1963." Seizure was vacated although the underlying economic dispute remained unsettled, notwithstanding the provision of section 295.180 of the King-Thompson Act that seized property "shall be returned to the owners thereof as soon as practicable *after* the settlement of said labor dispute," and despite the absence of any change in the situation which originally persuaded the Governor to institute seizure. The lifting of seizure in these circumstances obviously does not moot the controversy. This case presents the third time that the property of the Company has been seized upon a threatened strike by the Union. The first seizure lasted eight months, the second four months, and the third fourteen months. The six other seizures of other utilities were of similarly limited duration. Injunctions predicated on seizure are therefore inherently short term in character. The validity of such short term injunctions, manifesting a continuing exertion of power as occasion for its exercises arises, remains subject to judicial review notwithstanding termination of the particular

order. Furthermore, vacation of seizure does not rest on renunciation of the right to invoke it. The labor dispute is still unsettled. A renewed strike over it simply augurs renewed seizure. And even if this dispute were settled, upon any future dispute seizure would again be invoked in the event of an actual or threatened strike by the Union. Remission of the wrong, to erupt again as soon as occasion requires, does not terminate the controversy. Public interest in determination of the validity of the King-Thompson Act joins the twin elements of a short-term order and likelihood of repetition in precluding a mootness conclusion. Finally, seizure was vacated almost at the moment of initial consideration of the appeal by this Court and nothing accounts for it but the appeal. If vacation of seizure on the eve of the appeal can undo it, the keys to the Court are in appellee's pocket. The requirement that a federal court adjudicate only a live controversy cannot be manipulated into a power in the offender to decide for himself when if ever he chooses to be brought to judgment.

ARGUMENT

I. THE KING-THOMPSON ACT IS IN CONFLICT WITH AND PRE-EMPTED BY THE LABOR MANAGEMENT RELATIONS ACT, 1947

There is of course no question but that the operations of the Company affect interstate commerce so as to bring its labor relations within the governance of the Labor Management Relations Act, 1947, and to subject it, its employees and the Union to the jurisdiction of the National Labor Relations Board. The Board asserts jurisdiction "over all public utilities which do a gross volume of business of at least \$250,000 per annum or which have an outflow or inflow . . . across State

lines . . . of \$50,000 or more per annum." *Sioux Valley Empire Electric Assn.*, 122 NLRB 92, 94. More particularly, the Board asserts "jurisdiction over all transit systems which do a gross volume of business of at least \$250,000 per annum." *Charleston Transit Co.*, 123 NLRB 1296, 1297. See also, *HPO Service, Inc.*, 122 NLRB 394, 395. The Board pointed out that by adoption of the public utility standard it "endeavored reasonably to ensure that its jurisdiction will be exercised over all labor disputes involving local public utilities which exert or tend to exert a pronounced impact on commerce." *Sioux Valley Empire Electric Assn.*, 122 NLRB 92, 94. The Board announced this standard on October 2, 1958, and it was in effect on August 1, 1959. By Section 14(c)(1) of the National Labor Relations Act, newly enacted in 1959, Congress provided that "the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." There cannot be the least doubt, therefore, that a public utility like the Company is precisely the kind of enterprise that Congress brought and kept within the governance of the national labor laws through the exercise of its power to regulate interstate commerce.

It is equally clear that the King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947. We shall show, first, that this has been authoritatively established by this Court in its decision in *Amalgamated Association S.E.R.M.C.E. v. Wisconsin Employment Relations Board*, 340 U.S. 383, and second, that since the decision in *Amalgamated Association* Congress has been repeatedly asked and has consistently refused to change the law so as to allow

state prohibition or regulation of strikes and collective bargaining in local public utilities. In the course of this showing we shall independently demonstrate the incompatibility of the King-Thompson Act with the Labor Management Relations Act, 1947.

A. The Decision in Amalgamated Association Controls This Case

Amalgamated Association controls this case. In 1958 the Missouri Supreme Court sustained the validity of the King-Thompson Act against an attack on conflict and constitutional grounds. *Missouri v. Local No. 8-6, Oil Chemical & Atomic Workers Union*, 317 S.W. 2d 309. Its judgment was appealed to this Court. The Court did not reach the merits of the question because it concluded that the controversy had been mooted. In dissenting from this disposition, Mr. Chief Justice Warren, Mr. Justice Black, and Mr. Justice Brennan stated that the "wrongfulness in holding the case moot is emphasized by our belief that the state court was plainly without any jurisdiction over this controversy unless the Court wants to overrule *Amalgamated Association S.E.R.M.C.E. v. Wisconsin Employment Relations Board*, 340 U.S. 383, and adopt the views of the three dissenters in that case. We would follow that holding and reverse this case on the merits." *Local No. 8-6, Oil, Chemical & Atomic Workers Union v. Missouri*, 361 U.S. 363, 372. In *Amalgamated Association* this Court invalidated the Wisconsin Public Utility Anti-Strike Law because it conflicted with the National Act. The Wisconsin Act made it "unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service"

(§ 111.62). The same conflict which invalidated the Wisconsin Act nullifies the Missouri Act.

1. Collective Bargaining With the Right to Strike At Its Heart Is the Essence of the National Act

Analysis begins with identifying the attributes of the National Act with which the state statute collides. Collective bargaining with the right to strike at its heart in the essence of the federal scheme. Section 7 of the National Act guarantees to employees the right "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *U.A.W. v. O'Brien*, 339 U.S. 454, 456-457.

More particularly, collective bargaining means free and private negotiation by which the employer and the union seek to reach agreement upon the terms which shall govern the wages, hours and working conditions to prevail at the enterprise. The content of the bargain is left to them. What an agreement should contain "is an issue for determination across the bargaining table" (*N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395, 409); the government is not to "sit in judgment upon the substantive terms of collective bargaining agreements" (*id.* at 404). "The Act does not fix and does not authorize anyone to fix generally applicable standards of working conditions." *Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6. "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the

employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize strife. * * * The purposes of the Act are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 295.

But vis-a-vis the parties it is meaningless to say that the content of the bargain is for them to decide unless they have the power to bargain as equals. And to bargain as an equal a union must have a sanction it can invoke to make its voice heard. For this reason the right to strike to support economic demands is indispensable to collective bargaining. As the Court has stated, the "strike threat. . . together with the 'occasional strike itself, is the force depended upon to facilitate arriving at satisfactory agreements.'" *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 291. And it later elaborated this basic premise upon which the National Act rests (*N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477, 488-489):

It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary, and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and

their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. One writer recognizes this by describing economic force as "a prime motive power for agreements in free collective bargaining." Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess.

In short, the parties are to determine the terms of their agreement for themselves, and the right to strike is essential to the process. The overhanging threat of a strike gives efficacy to negotiations by realization that if accord is not reached a strike may be the alternative. And as a two-edged sanction since it hurts both employees and the employer, both sides know that recourse to a strike can be injurious to each. Bargaining is therefore meaningful because the consequence of the failure to agree is unpleasant. Industrial peace is achieved because the right to resort to a strike without actual recourse to it ordinarily suffices to induce in the bargainers a frame of mind receptive to a reasonable

and responsible settlement. The occasional strike which does occur is part of the liberty to write their own agreement dear to both sides and essential to a free economy. This is the essence of the federal scheme. Prohibition of the strike upon seizure of the utility is inimical to it. As in this case, when the employer knows that the consequence of failure to agree is not a strike but its ban by seizure with employment terms left in *status quo* and the employer free to operate as he pleases, there is no incentive in the employer to contract on any terms but his own. There is no realistic freedom of the parties to write their own agreement, for the employer can stand fast and the union has no means by which to move him. In a word, nullification of the right to strike destroys not only the strike but collective bargaining which cannot exist without it. This is what the King-Thompson Act does. A state enactment which cuts so deeply into the federally protected scheme cannot survive.

2. The State Statute Collides With the National Act by Prohibiting a Strike as a Means of Enforcing Bargaining Demands

Section 295.200 of the King-Thompson Act makes "unlawful" "any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state . . . as means of enforcing any demands against the utility or against the state." The section could not more bluntly identify its point of conflict with the National Act. It prohibits a strike as a means of enforcing demands. As the Court said of the Wisconsin Act in *Amalgamated Association*, so it may be said with precise parity of the King-Thompson Act, "It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in industries covered

by the Federal Act, has forbidden the exercise of rights protected by § 7 of the Federal Act." 340 U.S. at 398. The Court later described *Amalgamated Association* as a case in which "the state court issued an injunction under a statute which made it a misdemeanor to interrupt by strike any essential public utility services. It was held that the state statute was invalid in that it denied a right which Congress had guaranteed under § 7 of the Taft-Hartley Act—the right to strike peacefully to enforce union demands for wages, hours and working conditions." *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 474-475. The King-Thompson Act is invalid for the identical reason. "Congress occupied this field and closed it to state regulation." *Amalgamated Association*, 340 U.S. at 390. And the need for exclusive national regulation is especially emphasized by the fact that in this case the Company is an interstate enterprise straddling the border of two states and transporting passengers across state lines. *U.A.W. v. O'Brien*, 339 U.S. 454, 458.⁴

⁴ Indeed, independently of implementing legislation by Congress, the King-Thompson Act as applied offends the Commerce Clause standing alone. The interstate transportation of passengers between Kansas and Missouri is a single, indivisible, interstate journey. The bus driver operating an interstate route cannot stop at the Missouri boundary and inform the passengers that he goes no further. Maintenance employees have no way of segregating their work so as to refuse to service buses operating in Kansas but not in Missouri. The "network of the system and the integration of the operation is such that it would be a physical impossibility to divide the two" (R. 76, see also, R. 75-76, 27-28). Prohibition of the strike in Missouri causes it therefore to cease in Kansas as well. The strike must be conducted on an interstate basis or not at all. There is no way by which it can be continued in Kansas if it is halted in Missouri. Accordingly, as with ferry transportation of freight and passengers across the Delaware River to and from Gloucester, New Jersey, and Philadelphia, Pennsylvania (*Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196), and with transpor-

3. The Public Character of a Utility Does Not Validate State Regulation of Utility Strikes

To support the prohibition of the strike which the King-Thompson Act works, the court below invokes the public character of a utility and its historic amenability to control, the importance of uninterrupted utility services to the community, and the utility's duty to render continuous service. *Missouri v. Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309, 317-319; R. 180-181. But this of course was the exact situation in *Amalgamated Association*. There can hardly be a legal difference between a strike interrupting surface transportation in Milwaukee, as in *Amalgamated Association*, and a strike interrupting

tation across a bridge spanning the Ohio River and connecting the states of Ohio and Kentucky (*Corington & C. Bridge Co. v. Kentucky*, 154 U.S. 204), and with street car transportation of passengers across an interstate bridge between points in Covington, Kentucky, and Cincinnati, Ohio (*South Covington & Cin. Ry. Co. v. Corington*, 235 U.S. 537), so here, "it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them is a subject of national character and requires uniformity of regulation." *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 204. See also *Morgan v. Virginia*, 328 U.S. 373; *Southern Pac. Co. v. Arizona*, 325 U.S. 751; *Hanley v. Kansas City S. Ry. Co.*, 187 U.S. 617, 620; *Mo., K. & T. Ry. Co. v. Texas*, 245 U.S. 484.

The question of the independent operation of the Commerce Clause has not been presented on this appeal. In moving the court below to expedite the appeal before it, appellants offered to drop the Commerce Clause question to secure favorable consideration of the motion (R. 152-153). Upon grant of the motion (R. 157), in consideration of the basis for it, appellants did not brief the Commerce Clause question to the court below (Br. pp. 11-12). The court below nevertheless decided the question adversely to appellants on the merits (R. 175-176), and on that basis curiously concluded that appellants "may properly abandon" the question (R. 176). In view of the awkward procedural posture of the question, appellants decided that it was inappropriate to present it to this Court.

surface transportation in Kansas City, as in this case. An exception in favor of state regulation of utility strikes was not carved out in *Amalgamated Association* and it cannot be here.

Thus the majority opinion in *Amalgamated Association* noted that "the Wisconsin Supreme Court stressed the importance of utility service to the public welfare and the plenary power which a state is accustomed to exercise over such enterprises." 340 U.S. at 388. The dissent in *Amalgamated Association* invoked "the historic amenability to legal control of public callings. . . ." *Id.* at 405. But the view which prevailed is that "No distinction between public utilities and national manufacturing organizations has been drawn in the administration of the federal Act, and, when separate treatment for public utilities was urged upon Congress in 1947, the suggested differentiation was expressly rejected. Creation of a special classification for public utilities is for Congress, not for this Court."⁵ *Id.* at 391-393.

⁵ Later cases emphasize the Court's commitment to the view that the utility character of the enterprise can make no difference. Kentucky sought to require drivers of common and contract carriers to cross against their will a picket line established at a plant where a strike was in progress to make deliveries to and accept shipments from the struck plant, invoking the duty of the carrier and its employees to render service. *General Drivers Local Union No. 89 v. American Tobacco Co.*, 264 S.W. 2d 250. The Court reversed in a *per curiam* opinion, 348 U.S. 978, citing *Amalgamated Asso. v. Wisconsin Employment Relations Board*, 340 U.S. 383, which stands for the proposition that the public character of a calling does not justify state alteration of the standard of conduct promulgated by the National Act, and *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, which stands for the proposition that a State cannot overcome the applicability of the National Act by a plea that the State is invoking a ground of intervention different from that on which federal supremacy has been exercised. See also,

4. The Validity of the King-Thompson Act Is Not Saved by Labelling It "Strictly Emergency Legislation"

The court below maintains that the "King-Thompson Act is strictly emergency legislation. . . ." R. 171, 182, 184-185; *Missouri v. Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 321. Ad-

Teamsters Local Union No. 327 v. Kerrigan Iron Works, 353 U.S. 968; *McCrary v. Aladdin Radio Industries*, 355 U.S. 8. And see, *N.L.R.B. v. Globe Wireless, Ltd.*, 193 F. 2d 748, 750-751 (C.A. 9).

The court below states that, in accepting employment with a public utility, employees must be assumed to have done so in the light of the Public Service Commission law plus the King-Thompson Act and the subordinating impact these exert on their exercise of the right to strike, "and such law necessarily becomes a part of their contract of employment" (R. 180-181). It is pure fiction to say that a contract of employment existed incorporating the Public Service Commission law or the King-Thompson Act to which the employees assented. Fiction aside, a contract which derogates from the rights conferred by the National Act "obviously must yield or the Act would be reduced to a futility." *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 337; see also, *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 364; *Local 1976, United Brotherhood of Carpenters v. N.L.R.B.*, 357 U.S. 93, 105. Well before the Wagner Act, section 2 of the Norris-LaGuardia Act (47 Stat 70, 29 U.S.C., see, 101, *et seq.*) had declared the "public policy of the United States" to include "full freedom" for the worker "to negotiate the terms and conditions of his employment" and to this end to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection;" section 3 of the Norris-LaGuardia Act then provided that "any . . . undertaking or promise in conflict with the public policy declared in section 2 of this Act . . . is hereby declared to be contrary to the public policy of the United States. . . ." Whether or not section 3 of the Norris-LaGuardia Act has general application or is limited to a court of the United States, there is no doubt that sections 7 and 8(a) of the National Act embody the same command as section 3 of the Norris-LaGuardia Act and create positive law binding on all. The notion of the court below that employees by working for a public utility accept inferior status is precisely the argument which Congress in 1947 rejected when it declined to heed Congressman Hoffman's plea that "they know they are in the public service when they go to work in an industry of that kind. . . ."

vertence to "emergency" legislation simply restates in another form the basic plea that the importance of utility services justifies the State in establishing a different standard of labor relations to enterprises furnishing such services than the National Act prescribes. We shall show that (a) this Court in *Amalgamated Association* rejected just this argument and the view that it did not rest on a plain misreading of its opinion, and (b) there is no difference between the King-Thompson Act and the Wisconsin statute considered as "emergency" legislation.

(a) Appeal to the so-called emergency nature of the King-Thompson Act is based on the mistaken view that this Court left open this ground for exercising state authority in the utility field. Plainly it did not. In *Amalgamated Association* the validity of the Wisconsin Act was defended upon the following basis: In 1947 "Congress enacted special procedures to deal with strikes which might create national emergencies"; this shows a "congressional intent to carve out a separate field of 'emergency' labor disputes"; since "Congress acted only in respect to 'national emergencies,' . . . Congress intended, by silence, to leave the states free to regulate 'local emergency' disputes." 340 U.S. at 393-394. This Court rejected this argument on alternative grounds: first, the Wisconsin Act is not "emergency" legislation, and, second, it would make no difference even if it were. As to the first ground the Court stated that (340 U.S. at 393-394):

However, the Wisconsin Act before us is not "emergency" legislation but a comprehensive code for the settlement of labor disputes between public-utility employers and employees. Far from being limited to "local emergencies," the act has been

applied to disputes national in scope, and application of the act does not require the existence of an "emergency."

As to the second ground the Court stated that (340 U.S. at 394):

In any event, congressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce. * * * And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with the federal law.

Thus this Court plainly held that an "emergency" caused by a strike does not justify state regulation of it. That this was an alternative ground for decision does not in the least detract from its authoritativeness. It is old law that "where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537. On the contrary, "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.' " *United States v. Title Insurance & T. Co.*, 265 U.S. 472, 486. "In such a case the adjudication is effective for both." *Massachusetts v. United States*, 333 U.S. 611, 623. See also, *Union P.R. Co. v. Mason City & F. & D. R. Co.*, 199 U.S. 160, 166; *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340.

(b) Comparison of the King-Thompson Act with the Wisconsin Act shows clearly that both are based on the same philosophy and directed to the same end. Each embraces the premise that utility service is too important to permit its interruption and therefore utility strikes should be prohibited in order to maintain service. Thus section 111.50 of the Wisconsin Act declares that public utility labor disputes "are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and *creates an emergency* justifying action which adequately protects the general welfare" (emphasis supplied); section 295.010 of the King-Thompson Act indistinguishably states that "the possibility of labor strife in utilities . . . is a threat to the welfare and health of the people. . . ." *Infra*, p. 1a. Section 111.51 of the Wisconsin Act defines a "public utility employer" as any employer "engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state . . ."; section 295.020.1 of the King-Thompson Act defines the term "public utility" to include "any person engaged in the business of producing, distributing, selling, or otherwise furnishing electric light or power, heat, gas, steam, water, sewer service, transportation excepting railroads, communication, or any one or more of them to the people of Missouri." *Infra*, p. 1a. The Wisconsin Act describes a utility service as an "essential service" (sec. 111.51(2)); the King-Thompson Act defines utility services as "life essentials" (sec. 295.010, *infra*, p. 1a). The several steps of the Wisconsin Act are brought into play upon official determination that

the dispute "will cause or is likely to cause the interruption of an essential service" (secs. 111.54; 111.55); under the King-Thompson Act the Governor acts when he finds that "there is a threatened or actual interruption of the operation of such public utility as the result of a labor dispute" and the "public interest, health, and welfare are jeopardized" (sec. 295.180; *infra*, p. 8a). And as counterpart to the prohibition of the strike by the King-Thompson Act, the Wisconsin Act makes it "unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service" (sec. 111.62).

The two statutes cannot therefore be sensibly distinguished upon the basis that the King-Thompson Act more than the Wisconsin Act is distinctively devoted to sincere concern with the genuine hazards of interrupted utility service. Indeed, comparison of the instant case with the second of the companion cases in *Amalgamated Association* shows the untenable character of any such differentiation. In this case the judgment that "public interest, health and welfare" were jeopardized within the meaning of the King-Thompson Act rests primarily upon apprehension that a transit strike would substantially curtail retail sales in the downtown area of Kansas City, Missouri (R. 113, 84, 85-86, 87-91, 95, 108).⁶ In the second of the

⁶ Describing the strike as "sudden and total" (R. 172, 159), the court below appears to state that, had the strike been preceded by "reasonable notice and an opportunity to the public to adjust to such a situation," it would not "necessarily create such an emergency . . . as to justify permanent injunctive relief under the King-Thompson Act" (R. 185). This hedged inspiration was arrived at by the court below *sua sponte* and happens to be in com-

companion cases considered by this Court in *Amalgamated Association (United Gas, Coke & Chemical Workers v. Wisconsin Employment Relations Board*, No. 438, October Term, 1950, 340 U.S. 383, 386), the

plete conflict with the uncontroverted evidence. The Union gave more than three days' notice of the specific time the strike would begin, its president having on November 10 "handed the parties at the Federal Mediation and Conciliation office a so-called strike notice in which he pointed out that at midnight on November 13th all employees were instructed to cease work for the Kansas City Transit. . . ." (R. 51). The Police Department had received "advance notice" of the strike and had prepared for increase in auto traffic by maximum assignment of traffic officers to duty (R. 116). The impending strike had been well publicized to the community (R. 29, 80, 94-95). "News that a large public utility strike and seizure are imminent in Missouri is a dramatic occasion. By newspaper, radio and TV the facts before and during seizure are extensively publicized. St. Louis and Kansas City newspapers and broadcasting stations give the public prompt and accurate news of strike and seizure developments." Missouri State Board of Mediation, *Twelve Years Under the King-Thompson Act, 1947-1959*, 23 (1959). Based on the "threatened strike" the seizure papers were prepared and seizure was effected before the commencement of the strike (R. 132-137, 37). There is thus no possibly tenable basis for the view of the court below that there was no sufficient advance notice of the strike. And, had this view been a genuine basis for decision, the court below presumably would have modified the injunction to permit resumption of the strike upon giving whatever prescribed notice the court below deemed adequate. If it had, it would make no difference. For, to require advance notice of the specific time of the strike call itself conflicts with the National Act. That Act makes no such provision. Its section 8(d) requires a sixty-day notice of proposed termination or modification prior to the expiration of an existing agreement, a thirty-day notice to the federal and state mediation agencies, and desistance from a strike or lock-out during such sixty-day notice period or the expiration of the agreement whichever is later. But there is no requirement that, after compliance with the terms of section 8(d), there must be a further notice in advance of the strike of the specific time it will begin.

As expressed in the testimony of the Chairman of the Missouri State Board of Mediation, in the actual administration of the

situation was far more serious. In the *United Gas* case a union and its officers were held in contempt for ignoring a state court restraining order which required them to call off a strike against the gas company. The strike began at 6:00 a.m., October 5, 1949. In its opinion, the Supreme Court of Wisconsin detailed the consequences (258 Wis. 1, 4; 44 N.W. 2d 547, 549):

At 11:00 a.m. the public was advised to curtail consumption of gas and an appeal to consumers of gas was made to shut off the service; the steam pressure dropped to zero in the boiler room and no further pumping could be done with the main pumping facilities; the fires had to be pulled from the boilers reducing the steam pressure, and all facilities had to be stopped; a minimum pressure in the distribution system was kept in order that the air would not get into the mains so as to prevent any explosions due to the mixture of gas and air in the distribution system; the sendouts dropped to twenty-five per cent of what they had been previously. Low pressure in the system created a dangerous condition fraught with the possibility of infinite injury to the public. The public was advised by radio broadcasts and through

King-Thompson Act requisite jeopardy within its meaning is deemed to exist whenever a strike causes total discontinuance of service by that utility (R. 57-58). Entering into the judgment that jeopardy exists are factors which are indigenous to any strike and are not distinctive attributes of a utility strike. Thus appellee adduced evidence that "a prolonged strike would certainly hurt the company very much by the loss of earnings" (R. 96); strikers during the course of a strike secure work elsewhere and may not return to work at the end of the strike causing the Company the expense and inconvenience of training replacements (R. 99); the strikers themselves "suffer materially" (R. 99); and there would be an interruption in the business of non-struck firms causing their employees to be "without jobs and without earnings." (R. 115). It is thus the fact of a strike, and not simply the fact of a utility strike, that offends appellee.

the newspapers to shut off appliances and to shut off the service at the meter. [Emphasis supplied.]

The restraining order was signed at 12:55 p.m., and served at 2:00 p.m. As the Wisconsin Supreme Court pointed out (258 Wis. at 5, 44 N.W. 2d at 549), the requirement of immediate compliance was embodied in the restraining order "[b]ecause of the seriousness of the situation already referred to resulting from the partial or complete stoppage of the essential service of furnishing gas to the public. . . ." And it predicated state authority to enforce the challenged restraining order squarely on the theory that state power to protect the public health, safety and welfare in "local emergencies" arising out of public utility strikes was not superseded by the National Act. 258 Wis. at 7-9, 44 N.W. 2d at 550-551.

This Court nevertheless reversed the contempt conviction. As it stated, "Having found that the Wisconsin Public Utility Anti-Strike Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand." 340 U.S. at 399. The state court was "without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption." *In re Green*, 369 U.S. 689, 692. Hence, in this case, to describe the King-Thompson Act as "emergency" legislation or to say that it treats with "emergency" situations provides no basis for sustaining its validity. A state acquires no power to act inconsistently with the standards prescribed by the federal statute because it acts "for reasons other than those having to do with labor relations. In *Amalgamated Association* . . . the statute was directed at the preservation of public utility services and not at maintenance of sound labor rela-

tions, but the State's injunction was reversed." *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480. See also, *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 295-296; *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244.

5. The King-Thompson Act Is Not Saved by the Plea That It Is Not a "Comprehensive Code" for Labor Disputes in Utilities: the Compulsory Hearing, Fact-Finding, and Recommendation Procedure It Prescribes Itself Conflicts With the National Act

The King-Thompson Act is not saved by the parallel plea that it "is not a comprehensive code for the settlement of labor disputes in utilities as the Wisconsin Act appeared to be." R. 171; *Missouri v. Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 321. First of all, whether comprehensive or cursory, the state enactment falls if it conflicts with the National Act. In any event, the King-Thompson Act is not meaningfully less comprehensive than its Wisconsin counterpart.

The King-Thompson Act in its very declaration of policy asserts that "the state's regulation of labor relations affecting such public utilities is necessary in the public interest" (§ 295.010, *infra*, p. 1a). It imposes requirements with respect to the duration, renewal, and change of collective bargaining agreements in public utilities. Thus, it requires that a collective bargaining agreement "shall be reduced to writing and continue for a period of not less than one year. . . . Such agreement shall be presumed to continue in force and effect from year to year . . . unless either or both parties thereto inform the other, in writing, of the specific changes desired to be made therein and shall also file a copy of such demands with the state board of mediation, at least sixty days before" the expiration of the

agreement or any yearly renewal of it (§§ 295.090, 295.100, *infra*, pp. 4a-5a). In contrast, the National Act requires a "written contract" only "if requested by either party" (§ 8(d)); it prescribes neither minimum duration nor automatic renewal; and it does not provide that a notice of termination or modification shall state the "specific changes" sought. The King-Thompson Act requires that, where *no* agreement exists and either the utility or the employees desire to effectuate a change in the terms of employment, "it shall be the duty of the party desiring such change, not less than sixty days prior to the effective date thereof, to inform the other party in writing of the specific changes so desired in the manner in which they are desired, either by written contract or otherwise and to file a copy of such terms with the state board of mediation" (§ 295.110, *infra*, p. 5a). In contrast, the National Act contains no such requirement. *Cf. N.L.R.B. v. Katz*, 369 U.S. 736; *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9. The King-Thompson Act provides penalties, including revocation of the utility's certificate of convenience and necessity, where the State Mediation Board has found "that any public utility has refused to bargain collectively in good faith with its employees over the terms and conditions of employment" (§ 295.200.5, *infra*, p. 10a). It requires that representatives "shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other" (§ 295.140, *infra*, p. 7a). And, most particularly, it establishes a special type of compulsory hearing, fact-finding, and recommendation procedure applicable to labor disputes in public utilities which itself conflicts with the National Act (§ 295.120, *infra*, p. 6a).

Thus, in contrast to the state scheme of obligatory hearing and fact-finding plus recommendation of settlement terms, the essence of the federal scheme for mediation and conciliation is voluntarism—that the mediation and conciliation methods employed shall be acceptable to the parties and not forced on them. Section 202(a) of the National Act creates an independent agency known as the Federal Mediation and Conciliation Service and places it under the direction of a Federal Mediation and Conciliation Director. The Director “has no power except to act as a mediator and try to bring all parties to a dispute together. He cannot compel either party to any dispute to do anything.” 93 Cong. Rec. 4591 (Senator Ball). The Mediation Service he directs “is purely voluntary.” The Act creating it “does not give anyone any power.” *Ibid.* Thus, section 203(e) of the National Act specifically provides, after defining the role of the Mediation Service, that “the failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.” Even in the field of national emergency strikes, when the President convenes a board of inquiry to look into the dispute and “to make a written report to him”, section 206 of the National Act explicitly states that “Such report shall include a statement of the facts with respect to the dispute, including each party’s statement of its position *but shall not contain any recommendations*” (emphasis supplied). Withholding the power to recommend is an affirmative part of the national labor policy prescribed by Congress. In the discharge of its function to study and investigate “the administration and operation of existing Federal laws relating to labor relations” (§ 402(7), National Act), the Joint Committee on

Labor-Management Relations reported that (Com. Print, Rep. No. 986, Part 3, 80th Cong., 2d Sess., 22 (1948)):⁷

A further suggestion has been made that the emergency board be permitted to make recommendations as well as find the facts in these disputes. That alternative to the act's procedure was considered at length by the committees who drafted the act, and rejected by them as being in fact compulsory arbitration with public opinion providing the compulsion. The committee does not believe, in view of the success of the present procedure, that any case has been made for the adoption of that which was rejected by the committees who framed the law.

In short, as explained by William E. Simkin, present Director of the Federal Mediation and Conciliation Service, "It should be made clear at the outset that we do not and never have conceived of mediation as a decision-making process. Our sole reliance is on persuasion. We seek no powers other than the right and obligation to attempt to persuade. This concept obviously includes the right of any company or any union to decide against any particular suggestion that may be made."⁸

⁷ This report has often been relied upon by this and other courts as a valid expression of congressional purpose. *United Mine Workers v. Arkansas-Oak Flooring Co.*, 351 U.S. 62, 75, n. 14; *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 288 and n. 5, and concurrence at 299-300; *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 9, n. 15, and dissent at 14 and n. 3, 15, n. 7; *American Newspaper Publishers Assn. v. N.L.R.B.*, 345 U.S. 100, 108, n. 8; *N.L.R.B. v. Wiltse*, 188 F. 2d 912, 921-924 (C.A. 6), cert. denied, 342 U.S. 859; *Herzog v. Parsons*, 181 F. 2d 781, 788 (C.A.D.C.), cert. denied, 340 U.S. 810.

⁸ Simkin, *Role of Government in Collective Bargaining*, 50 LRR 126, 129 (1962).

The King-Thompson Act proceeds on an opposite tack. Upon receipt of notice of a labor dispute, the State Mediation Board "shall require" the parties "to keep it advised as to the progress of negotiations"; "the board may fix a time and place for a conference between the parties to the dispute and the board or its representatives and shall take whatever steps it deems expedient to bring about a settlement of the dispute"; "It shall be the duty of all parties to a labor dispute to respond to the summons of the board for joint or several conferences with it or its representatives and to continue in such conference until excused by the board or its representative" (§ 295.080, *infra*, p. 4a). The State Mediation Board is given subpoena power (§ 295.070.2, *infra*, p. 3a). If no agreement is reached, the King-Thompson Act provides for a "public hearing panel" (§ 295.120.1, *infra*, p. 6a); the panel is appointed and acts regardless of the wishes of the employer or the union or both not to designate members on it and not to participate in the hearing (§§ 295.120.2, 295.160, *infra*, pp. 6a, 7a-8a); the panel is to "hold and complete public hearings on the specific changes so requested, to the contract, agreement or understanding" (§ 295.120.2, *infra*, p. 6a); and "the panel shall file with the governor, in writing, a report setting forth a statement of the controversy, a resume of the evidence submitted to it and its recommendations based thereon" (§ 295.150, *infra*, p. 7a). "Should either the utility or its employees refuse to accept and abide by the recommendations made . . . and as a result thereof the effective operation of a public utility be threatened or interrupted," the Governor is empowered to seize the utility (§ 295.180.1, *infra*, p. 8a). Not inaptly the King-Thompson Act describes the process as "compulsory arbitration" (§ 295.170, *infra*, p. 8a).

In this case, instead of following the public hearing panel route prescribed by the King-Thompson Act, the Chairman of the State Mediation Board took the "position . . . that the State Board of Mediation as such had the same powers and jurisdiction as that of a panel which is provided for in the law . . ." (R. 70). "The members of the Board are in unanimous agreement that the powers vested in the Board . . . [to take whatever steps it deems expedient to bring about a settlement of the dispute], and as intended from the remaining provisions of the King-Thompson Act, justify the Board in its purpose to hear the issues in dispute and to exercise its mediation authority, including recommendations for settlement" (R. 146, 71). Accordingly, on October 31, 1961, the Governor of Missouri wired the Union urging it to "accept the services of the full membership of the State Board of Mediation forthwith to hear the most important issues and make recommendations for settlement" (R. 143, 70). On November 1, 1961, the Union wired its response, informing the Governor of its willingness to "accept the mediation efforts" of the state agency "provided that such efforts do not include hearings which result in recommendations" (*ibid.*). On November 6, 1961, the Chairman of the State Board notified the Company and the Union of his intention to assemble the full Board, and on November 8, 1961, the Board convened (R. 69, 52). Orally and in writing, at the meeting on November 8, the Union stated that, as ground rules for a successful proceeding, the State Board should act in a mediatory capacity only, "without any hearing of a public nature" and without "recommendations, public or otherwise" (R. 69-71, 52-54, 144-146). The Union "has always felt that negotiations cannot be properly conducted in the news-

papers or in the public" (R. 70). The State Board declined to commit itself to the method of proceeding requested by the Union, and the Union then withdrew from participation in the meeting of November 8 (R. 70-71, 52-54, 144-146). Thereafter, on November 11, 1961, the State Board issued a public written recommendation for settlement, proposing a wage increase only, all other unresolved issues to be dropped (R. 54-56).

The State Mediation Board thus acted in a manner incompatible with the standards of the National Act. To be sure, the National Act contemplates that the States may furnish mediation and conciliation service even though the dispute may otherwise be within the purview of the National Act (§§ 8(d)(3), 203(b)). But state participation in mediation and conciliation must be in keeping with federal standards. And the essence of the federal scheme is voluntarism. Persuasion is its motif. Helping the parties to help themselves by means palatable to them is the idea. The entire direction is to interfere as little as possible with the parties in working out their agreement for themselves. In contrast, the King-Thompson Act empowers the State Mediation Board to "take whatever steps it deems expedient to bring about a settlement of the dispute" (*supra*, p. 45); the parties are to remain in "conference until excused by the board or its representatives" (*supra*, p. 45); and compulsory hearing and fact-finding plus recommendation of settlement terms is decreed (*supra*, p. 45). In this case, arrogating to itself the role of a public hearing panel, the State Mediation Board proceeded to carry out the activist functions prescribed by the King-Thompson Act. And that statute in terms states, and

the State Mediation Board in fact applied, a method of dispute settlement in "conflict with the national policy of free and unfettered collective bargaining. . . ." *General Electric Co. v. Callahan*, 294 F. 2d 60, 67 (C.A. 1). What the Court of Appeals for the First Circuit stated in the latter case in invalidating a Massachusetts statute similarly based on an activist method of dispute settlement applies here (*ibid.*):

The obvious [state] statutory purpose is to coerce agreement by invoking official action to mold public opinion with respect to a labor dispute to the end of bringing the pressure of public opinion to bear to force a settlement. This is quite contrary to the national policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at after "good faith" bargaining between the parties. The conflict between the state and federal policy is obvious.

As expressed by the Joint Committee on Labor Management Relations, the method employed is "in fact compulsory arbitration with public opinion providing the compulsion" (*supra*, p. 44).

At all events, for the court below to say that the King-Thompson Act "is not a comprehensive code for the settlement of labor disputes in utilities" (*supra*, p. 41), and to attempt on that basis to distinguish the Wisconsin Act invalidated in *Amalgamated Association*, is to play games with the plain facts.

6. The Absence of Compulsory Arbitration in the King-Thompson Act Worsens Its Conflict With the National Act

A "main" difference identified by the court below to save the validity of the King-Thompson Act is that "the Wisconsin Act provided for compulsory arbitration while the King-Thompson Act does not." *Missouri v.*

Local No. 8-6, Oil, Chemical and Atomic Workers Union, 317 S.W. 2d 309, 321; R. 188. We pass the observation of the Joint Committee on Labor-Management Relations that recommendation of settlement terms is "in fact compulsory arbitration with public opinion providing the compulsion" (*supra*, p. 44). For the absence of compulsory arbitration worsens the conflict with the National Act. Both the Missouri and Wisconsin statutes prohibit a utility strike and both therefore cut to the heart of collective bargaining as federally envisaged. "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized"; "negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess." *N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477, 489. Prohibition of the strike thus gilds collective bargaining by depriving the union of the capacity to exert economic pressure to back its demands.

The Wisconsin statute at least sought to rectify the imbalance it created by providing compulsory arbitration as a substitute for the strike. While this nullifies the freedom of the parties to work out the terms of their agreement for themselves, it does not subject the employees to the practical necessity of accepting the employer's terms for lack of means to induce him to yield more favorable conditions. While neither result is compatible with agreement reached through negotiations which genuinely "reflect the strength and bargaining power" of the employees acting as a group (*J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 338), as between terms impartially determined by a disinterested body

and terms which an employer can unilaterally dictate because he can act without apprehension of a strike, the former more nearly harmonizes with the federal objective of "restoring equality of bargaining power between employers and employees" (Title, I, § 1, ¶ 4). There is no "equality of bargaining power" when there is no right to strike. And so, in prohibiting the strike without providing a compensating equivalent to substitute for it, the King-Thompson Act worsens the conflict with the National Act. It undoes the "whole effort . . . to restore equality between employer and employees in their dealings with each other . . ." (93 Cong. Rec. 5116, Senator Taft); it disrupts the "balance" sought by the National Act "where the parties can deal equally with each other and where they have approximately equal power" (93 Cong. Rec. 7537, Senator Taft).

7. Recourse to Seizure as the Particular Device to Signal Prohibition of the Strike Does Not Validate the King-Thompson Act

Not mentioned at all in its earlier opinion (*Missouri v. Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309), the reason now overridingly stressed by the court below to support the validity of the King-Thompson Act is that the strike is prohibited only in conjunction with possession of the utility by the State. R. 180-185. Utilization of seizure to signal prohibition of the strike does not save the statute. Congress canvassed and rejected seizure as an appropriate regulatory method.⁹

⁹ In addition to Missouri, seizure of the utility in the event of a strike is provided for by Massachusetts (Mass. Gen. Laws, Ann. ch. 150B, § 1-7 (1958)), New Jersey (N.J. Rev. Stat. §§ 34:13B-1 to -27 (Supp. 1961)), and Virginia (Va. Code Ann. §§ 56-509 to -528 (Repl. Vol. 1959)). North Dakota provides for seizure of "any coal mine or public utility" (N.D. Cent. Code §§ 37-0106 to

This Court settled the question in *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, when it held that the President had no constitutional power to seize the steel mills to avert a national emergency, and premised this conclusion in significant part on the fact that Congress in the Taft-Hartley Act had withheld seizure authority from the President even in national emergency strikes. Writing for the Court, Mr. Justice Black explained that (*id.* at 586):

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorize such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation,

-0107 (1960)). Hawaii provides for seizure of "any stevedoring company" (Haw. Rev. L. ch. 92, §§ 92-1 to 92-11 (1955)). Kansas had provided for the seizure of enterprises engaged in (1) food and clothing manufacture, (2) mining or production of any substance used for fuel, (3) transportation of food, clothing, or fuel, and (4) public utilities and common carriers (Kan. Gen. Stat. Ann. § 44-620 (1949)), but the statute of which seizure was a part had been invalidated by this Court in *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522. State statutory proliferation to embrace seizure of coal mines, stevedoring companies, and clothing manufacturers emphasizes the force of Senator Taft's observation that "If we begin with public utilities, . . . I do not know where we could draw the line" (*infra*, p. 53).

investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling off periods. All this failing, unions were left free to strike after a secret vote by employees as to whether they wished to accept their employers' final settlement offer.

In agreement, Mr. Justice Frankfurter observed that "Congress in 1947 was again called upon to consider whether governmental seizure should be used to avoid serious industrial shutdowns. Congress decided against conferring such power generally and in advance, without special Congressional enactment to meet each particular need" (*id.* at 598). As Mr. Justice Burton stated, "Collective bargaining, rather than governmental seizure, was to be relied upon" *Id.* at 657; see also *id.* at 639, n. 8 (Mr. Justice Jackson), *id.* at 662-666 (Mr. Justice Clark).

The power to seize which Congress withheld from the President to avert a national emergency it did not grant to a State Governor to avert a local emergency. No less than other short cuts to industrial peace, seizure "was rejected by Congress as being inconsistent with its policy in respect to enterprises covered by the federal Act, and not because of any desire to leave the states free to adopt it." *Amalgamated Association*, 340 U.S. at 395. Even as to the rejected bills which "would have permitted the operation of state anti-strike legislation" (*id.* at 394, n. 20), a leading proponent explained that "Government seizure should not be resorted to in any event" (93 Cong. Rec. A 1007; Representative Case). The nub of the matter was laid bare by Senator Taft, the architect of the Labor Management Relations Act, 1947, upon whose views

this Court strongly relied in *Amalgamated Association* (340 U.S. at 395, n. 21):

Basically, I believe that the Committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, *and in some cases perhaps danger*, to the people of the United States which may result from the exercise of such right. * * *

If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation.

We did not feel that we should put into law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, *or to seizure*, or to any other action. We feel that it would interfere with the whole process of collective bargaining. [Emphasis supplied.]

The incompatibility of seizure with the National Act is especially apparent here. For seizure here is wholly token in character; involving nothing but paper possession of the utility, and having as its consequence and objective nothing but prohibition of the strike (*supra*,

pp. 11-12).¹⁰ As the court below itself explained on a previous occasion when the very utility presently involved was taken over by the State pursuant to the King-Thompson Act (*Rider v. Julian*, 365 Mo. 313, 282 S.W. 2d 484, 494-495 (1955)):

The possession which . . . [the Governor's agent] assumed was largely declaratory in nature. It was proclaimed by the governor and again by . . . [the agent] . . . but actually nothing was done about it. * * *. The State's possession was not real or visible, nor was the transit company ousted from its "actual and continuous occupancy or exercise of full dominion" over its premises. * * *

It is apparent from the record, and we so hold, that possession of . . . [the Governor's agent] and the state was not intended to be and was not in fact actual possession. Insofar as the possession needs to be identified by name, it might be called a legal possession or a nominal and technical possession. It was more or less the assertion of the right to possession which did not, in this case, ripen into exclusive or actual possession.

In any event, whether nominal or real, seizure designed as an instrument for use in a labor dispute

¹⁰ In a remarkable insinuation the court below acknowledges the token character of the seizure "Assuming that the trial judge accepted and believed the testimony of the defendants' witnesses with reference to the State's operation of the utility . . ." (R. 174). There were not "witnesses" on this subject but only one witness and he was the Chairman of the Missouri State Board of Mediation designated by the Governor to act as his agent in taking possession of the utility (R. 137, 36-45, 62-65). We assume the court below does not mean to asperse his credibility. His testimony in this case is identical to his testimony in *Local No. 8-6, Oil Chemical & Atomic Workers Union v. Missouri*, 361 U.S. 363, October Term, 1959, No. 42, Record 261-270, 178-183. And the situation his testimony depicts is identical to that which the court below found to exist in *Rider v. Julian*, 365 Mo. 313, 282 S.W. 2d 484.

cannot be invoked compatibly with the National Act. When seizure is triggered by a strike, is aimed at stopping the strike, and has a duration limited by settlement of the labor dispute out of which the strike grows, the seizure to which the State resorts is a labor relations device in conflict with collective bargaining backed by the right to strike as guaranteed by federal law. This is forbidden to the State by the Supremacy Clause.

Seizure as a stop-gap measure in a labor dispute is of course wholly different from true governmental ownership and operation of a facility. A city is free to run its own subways or operate its own power plant just as the United States is free to run the Post Office or to build vessels in its own shipyards. When the Government is the permanent and exclusive owner and operator, the workers whom it employs are federal, state or city civil servants, and the labor relations of the governmental employer and the public employee are outside the scope of the National Act. This is the meaning of the statutory exclusion from the term "employer" as used in the National Act of "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof" (§ 2(2)), and from the term "employee" "any individual employed . . . by any . . . person who is not an employer as herein defined" (§ 2(3)). But these exclusions have no relevance when the governmental entity acquires the temporary role of an employer as a result of seizure triggered by a labor dispute and sheds that interim role upon vacation of seizure occurring no later than is practicable after settlement of the labor dispute. This is the meaning of *Youngstown Sheet & Tube Co. v. Sawyer*, 343

U.S. 579. The executive order invalidated in that case as beyond the power of the President to promulgate had expressly provided that "The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties possession of which is taken pursuant to this order shall be operated" (*id.* at 591). This may well have constituted the United States the employer of the steel workers for the period of seizure (*cf.*, *United States v. United Mine Workers*, 330 U.S. 258), and "the United States" is of course excluded by the National Act from the covered class of employers. But the statutory exclusion of the United States from the covered class of employers did not validate the seizure by which it had become the interim employer. Congress having withheld "provision for taking over property or running plants by the Government" (93 Cong. Rec. 4281, Senator Smith), respect for that decision required the conclusion that the seizure and the consequent assumption of the role of employer had been wrongful. A State is in no different position than the United States. The exclusion from the covered class of employers of "any State or political subdivision thereof" no more validates seizure by a State than does the parallel exclusion of "the United States" validate seizure by the United States. The crucial consideration is that Congress has decided against seizure. That decision cannot be undone by the indirection of a statutory exclusion applicable solely to true governmental ownership and operation.

The court below cannot therefore treat the case as if it put in issue the validity of forbidding a strike by governmental employees against the Government, nor

tax appellants for declining to be drawn into a fight on that artificial battleground. R. 180-182. Even if the State had in actuality assumed the role of the employer for the period of the seizure, the underlying fundamental question is the validity of the seizure pursuant to which this role was adopted. Arrogation does not settle the question of legality. But this case is even easier than that. For in this case the State did not in the least particular become the employer. The State's possession is altogether nominal. In no sense at all are the transit employees here the employees of "any State or political subdivision thereof." If they were, they would lose the protection of the National Act for the period of seizure, and this would mean that they would be vulnerable to discharge for union activity, the utility would not be obliged to bargain with their union, and any questions of representation involving them would not be determinable by the National Labor Relations Board. The result is unthinkable. There is no factual basis for it. The employees are obviously not public employees in any genuine sense.

The court below takes a related and equally untenable position. Relying upon the terms of the injunction prohibiting the strike "against the State of Missouri," and stating that appellants do not assert a right to strike against the State of Missouri, the court below seems to say that appellants have not taken issue with the single matter which the injunction prohibits (R. 177, 182, 185, 186). This is the sheerest casuistry. The strike which was enjoined could be denominated a strike "against the State" only in the sense that the State had taken nominal possession of the utility. The injunction against the strike was valid only if the seizure upon which it was predicated was valid. And

appellants at every stage forcefully and unmistakably contested the validity of the seizure and hence the validity of the injunction.¹¹ As the seizure and the injunction predicated on it are one and the same, an attack upon the seizure is indistinguishably an attack upon the injunction which takes its sole force, and efficacy from the seizure. We did not play Hamlet without Hamlet.

¹¹ Appellants' motion to dismiss explicitly stated that "Section 295.180 of said Law [the King-Thompson Act], providing that a public utility may be seized on the terms and conditions therein set forth is in conflict with the Labor-Management Relations Act, including but not limited to Section 7 and Section 13 thereof" (R. 9). Appellants' answer explicitly incorporated the grounds stated in the motion to dismiss (R. 132). At the trial, appellants adduced evidence showing the token character of the seizure (*supra*, pp. 11-12), as appears on the face of the opinion of the court below (R. 173-174), a showing compatible only with an attack upon the validity of the seizure. On appeal, the token character of the seizure was set out at length by appellants (Br. pp. 8-9), the "Points Relied On" explicitly stated that "Utilization of the seizure device to prohibit a public utility strike does not save the validity of the state enactment" (Br. p. 14), and this point was thereafter elaborated beyond mistake (Br. pp. 32-34), as appears on the face of the opinion of the court below (R. 189). Upon examination of the full record of the state proceeding, the three-judge federal district court, in staying the proceeding before it involving this controversy, recognized that the "permanent injunction was granted [by the Circuit Court of Jackson County] in a judgment *upholding the seizure and enjoining the strike*" (Jurisdictional Statement, p. 47a, emphasis supplied); it decided to abstain in deference to initial determination by the Missouri Supreme Court, recognizing that on the appeal pending before that court the validity of the seizure and injunction had been put in issue and would be adjudicated (Jurisdictional Statement, pp. 45a-54a). And appellee itself recognized that the state and federal actions presented "identical issues" (R. 61).

8. Invocation of the Police Power Does Not Support the King-Thompson Act

It need hardly be added that the King-Thompson Act cannot withstand an attack based on conflict with a federal statute by summoning in its support "the police powers of the state." *Missouri v. Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 316; R. 180, 189. A State cannot avoid the displacing impact of the Commerce Clause or federal legislation enacted pursuant to it "by simply invoking the convenient apologetics of the police power."¹² *Kansas City Ry. Co. v. Kaw Valley Drainage District*, 233 U.S. 75, 79. The meaning of the Supremacy Clause is that the exercise of paramount federal authority supersedes conflicting (*Hill v. Florida*, 325 U.S. 538) and indeed even complementary (*Campbell v. Hussey*,

¹² This is the short answer to the court below when it invokes the preamble to the National Act that industrial strife can be minimized or avoided if parties to labor disputes "above all recognize *under law* that neither party has any right in its relations with any other to engage in acts and practices which jeopardize the public health, safety or interest," from which it deduces that by "use of the term 'under law' state laws must have been intended as well as federal laws" because public health, safety, and interest are the traditional concern of the state police power. *Missouri v. Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 319; R. 182. All that we have said shows that "under law" means under the scheme of regulation Congress has created, which excludes state prohibition of utility strikes or interference with collective bargaining. It assumes the whole question, and disregards all the evidence, to say that "under law" must mean state law. Congress does not exclude state law out of disregard for "public health, safety, and interest"; on the contrary, Congress has determined that "public health, safety, and interest" are better served, evaluating it nationally rather than parochially, by free collective bargaining backed by the right to strike even in public utilities. Under the Supremacy Clause this judgment must prevail.

368 U.S. 297, 302) state regulation. "The legislation is not saved by calling it an exercise of the police power. . . ." *Charleston & W.C.R. Co. v. Varnville Furn. Co.*, 237 U.S. 597, 604

B. Congress Has Ratified the Rule of Amalgamated Association

Three times since this Court's decision in *Amalgamated Association* bills have been introduced, which Congress has by vote affirmatively refused to enact; designed to overrule that decision by amending the National Act to authorize state laws prohibiting or regulating strikes by public utility employees. Rejection by Congress took place in 1954, 1958 and 1959. Congress has thus ratified the rule of *Amalgamated Association* and again affirmed that public utility employees may not be subjected to state laws which deny or curtail the right to strike or to bargain collectively as guaranteed by federal law.

In 1954, Senator Smith of New Jersey introduced a bill of which section 16 proposed to add to section 14 of the National Act a new provision to read that (S. 2650, 83d Cong., 2d Sess., April 15, 1954):

(c) Nothing in this Act shall be construed to interfere with the enactment and enforcement by the States of laws to deal in emergencies with labor disputes which, if permitted to occur or continue, will constitute a clear and present danger to the health or safety of the people of the State: Provided, that no State shall be authorized by this subsection to take action in any labor dispute in which the Federal Government is acting pursuant to Sections 206 to 210, inclusive, of the Labor Management Relations Act, 1947, as amended.

This bill was in keeping with the recommendations of President Eisenhower in his message to Congress

that year (100 Cong. Rec. 129; H.R. Doc. No. 291, 83d Cong., 2d Sess., Jan. 11, 1954):

The act should make clear that the several States and Territories, when confronted with emergencies endangering the health or safety of their citizens, are not, through any conflict with the Federal law, actual or implied, deprived of the right to deal with such emergencies. The need for clarification of jurisdiction between the Federal and the State and Territorial Governments in the labor-management field has lately been emphasized by the broad implications of the most recent decision of the Supreme Court dealing with this subject. The Department and Agency Heads concerned are, at my request, presently examining the various areas in which conflicts of jurisdiction occur. When such examination is completed, I shall make my recommendations to the Congress for corrective legislation.

President Eisenhower further developed this view in a letter to Senator Smith (S. Rep. No. 1211, 83d Cong., 2d Sess., 8):

My associates are still studying this extremely complex problem, and while that study has not as yet been completed, it has gone far enough to develop some conclusions:

(1) Where the governor of a State determines that a labor dispute is endangering, or will endanger, the health and safety of the citizens of that State, certainly nothing in the Federal law should have the effect of preventing the State from dealing with that dispute. This was covered specifically in my message of January 11.

(2) Nothing in the Federal law should have the effect of preventing a state from exercising its traditional police powers for maintaining public order.

In reporting the Smith bill favorably, the Senate Labor Committee stressed that the amendments proposed fulfilled the President's recommendations. S. Rep. No. 1211, 83d Cong., 2d Sess., 2, 8. The Committee observed that the bill "authorizes the States and Territories to protect the health and safety of their citizens in labor disputes where genuine emergencies exist even though the enterprises involved are otherwise subject to the exclusive jurisdiction of the National Labor Relations Board. . . ." *Id.* at 3. And amplifying its basis for supporting the amendment, the Committee stated that (*id.* at 17):

As the committee reads the most recent of these decisions (*Garner et al. v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)* (346 U.S. 485, 74 S.Ct. 161, Dec. 14, 1953)), the States, in labor matters involving interstate commerce, are substantially limited to their traditional police powers to control violence and coercion, or to safeguard public order and safety and the use of streets and highways. Emergencies arising from labor disputes which threaten the health or safety of the people of the State but which are not accompanied by violence, coercion, obstruction of streets and highways, etc. are not lawfully subject to regulation by the States if the enterprise involved is one in or affecting interstate commerce as broadly defined by the courts.

Nor can the Federal Government act in connection with such local or statewide emergencies. The national emergency provision of the Taft-Hartley Act are applicable only to emergencies imperiling the national health or safety. As a consequence, no agency of Government has power to act in interstate situations where immediate action is essential to prevent disaster or widespread injury and damage but the emergency is not national in scope. The committee therefore approved an amendment

empowering the States and Territories to fill this gap even where interstate commerce is involved. Where intrastate commerce alone is involved the powers of the States remain undiminished.

The bill was debated at length on the Senate floor. In advocating its passage, Senator Smith observed that investiture of the States with power to deal with labor disputes thought to create an emergency was "one of the most controversial subjects in the bill" (100 Cong. Rec. 5836). He expressly agreed with Senator Holland, who in a series of questions pinned down the applicability of the proposed amendment to public utility strikes, that the States would be empowered to act in transit strikes where the affected transit company was substantially the only means of transportation available to large elements of the public. 100 Cong. Rec. 5838.

Despite administration support the Senate failed to pass the Smith bill. Rather, on May 7, 1954, it was recommitted by a vote of 50 to 42. 100 Cong. Rec. 6202.

In 1958 Senator Holland introduced a bill designed to overrule the decision in *Amalgamated Association* by amending the National Act to provide that (S. 3692, 85th Cong., 2d Sess.):

Nothing in this act or in the Labor Management Relations Act, 1947, shall be construed to nullify the provisions of any State or Territorial law which regulates or qualify the right of employees of a public utility to strike or which prohibit strikes by such employees.

As used in this subsection the term "public utility" means an employer engaged in the business of furnishing water, light, heat, gas, electric power,

sanitation, passenger transportation, or communication services to the public. . . .¹³

The measure was identical to bills which had been introduced by Senator Holland in 1951 (S. 1535, 82d Cong., 1st Sess., May 23, 1951) and 1955 (S. 527, 84th Cong., 1st Sess., June 18, 1955). On neither previous occasion were the bills reported out of committee. In 1958, at a hearing held by a subcommittee of the Senate Labor Committee, Senator Holland testified in favor of his bill and the International President of the Amalgamated Association (the parent organization of appellant Union) submitted a statement in opposition to it. *Hearings Before The Subcommittee on Labor of the Senate Labor Committee*, 85th Cong., 2d Sess., 465-493, 1444-48. The bill was not reported out of committee but Senator Holland introduced the measure on the floor of the Senate. He plainly disclosed the purpose of his proposed amendment in these terms (104 Cong. Rec. 11090):

We offer the amendments in the earnest hope that finally Congress will act to fill this particular legal "void"—or labor-management "no man's land"—which fails to assure the continued operation of local public utilities, which dangerous situation was created on February 26, 1951, by a strained interpretation, by the United State Supreme Court, in the so-called Wisconsin case, construing the legislative intent in the passage of the Taft-Hartley Act.

¹³ As reported to committee, the bill also covered an employer "operating a gas pipeline or a toll bridge or tunnel" but this additional coverage was deleted from the bill when brought to the Senate floor by Senator Holland. 104 Cong. Rec. 11090.

The proposed amendment was debated (104 Cong. Rec. 11090-11101) and voted upon and defeated 60 to 27 (*id.* at 11101).

Finally, in 1959, Congress enacted the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. § 401). On April 25, 1959, during the debate on the bill which became that Act, Senator Hollaud introduced the same amendment that he had introduced in 1958, 1955, and 1951. Again he made it plain that his purpose was to secure legislation that would overrule the decision in *Amalgamated Association* (105 Cong. Rec. 6733-6740). He observed that "Under the Court's decision in the Wisconsin case, the States . . . are left without any power at all . . . to keep their public utilities running" (*id.* at 6733); he decried an 83-day bus strike in Jacksonville, Florida, and a bus strike in Miami, Florida (*id.* at 6735); and in further support of his plea for permitting the States to regulate strikes in local public utilities he stated (*id.* at 6735):

I remind the Senate that the public utilities which serve in these fields are given licenses or franchises by the states in which they serve; that they are regulated by the states in which they serve; that they are given their licenses and franchises in order to serve the public; that they are required to serve the public; that no lockout or shutdown should be permitted.

When the suggestion was made that the matter be submitted to committee for further hearings Senator Hollaud did not withdraw the amendment but said (*id.* at 6740):

I hope . . . that the Senate will take the matter out of the hands of the Committee now by taking

favorable action on this very simple amendment to restore to the States the power to handle under their own laws, these relatively few vital industries.

As in 1958, the proposed amendment was again voted on and again defeated, this time by a vote of 64 to 27. 105 Cong. Rec. 6740.

Not only did Congress refuse to enact legislation authorizing state prohibition or regulation of public utility strikes, but in 1959 it affirmatively expressed its purpose to keep the labor relations of public utilities within the domain of federal law. It amended section 14 of the National Act to provide that:

(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

This amendment accomplishes a two-fold purpose: (1) it allows state regulation of labor disputes over which

the National Labor Relations Board has declined to exercise the jurisdiction it possesses, and (2) it prohibits declination of jurisdiction by the Board in any case in which it would assert jurisdiction under the standards it had established as of August 1, 1959. H. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 36-37. Under these standards the Board asserts jurisdiction "over all public utilities which do a gross volume of business of at least \$250,000 per annum or which have an outflow or inflow . . . across State lines . . . of \$50,000 or more per annum" (*Sioux Valley Empire Electric Assn.*, 122 NLRB 92, 94); more particularly, the Board asserts "jurisdiction over all transit systems which do a gross volume of business of at least \$250,000 per annum" (*Charleston Transit Co.*, 123 NLRB 1296, 1297); and by the public utility standard it adopted the Board "endeavored reasonably to assure that its jurisdiction will be exercised over all labor disputes involving local public utilities which exert or tend to exert a pronounced impact on commerce" (*Sioux Valley Electric Assn.*, 122 NLRB 92, 94). Thus Congress enacted the public utility standard into permanent law to establish the irreducible level at which the Board must act and no State may intrude.

The upshot is clear. Congress has ratified the rule of *Amalgamated Association*.¹⁴ It continues to refuse, as it had in 1947, to create a special classification for local public utility employees. It has again affirmed that such employees, no less than other employees engaged in operations that affect interstate commerce, may not be subjected to state laws which deny or curtail the

¹⁴ *Gullett Gin Co. v. NLRB.*, 340 U.S. 361, 365-366; *Queensboro Farm Products v. Wickard*, 137 F. 2d 969, 977 (C.A. 2).

rights guaranteed them by federal law. It has maintained in being for all employees the forthright policy expressed by Senator Taft in his concluding speech preceding the congressional overriding of the presidential veto of the Taft-Hartley Act: "... [The bill] is based on the theory that the solution of the labor problem in the United States is free, collective bargaining. . . . [W]e believe that the right to strike for hours, wages, and working conditions in the ultimate analysis is essential to the maintenance of freedom in the United States. . . . [O]ur freedom depends upon maintaining the free right to strike." 93 Cong. Rec. 7536-37. Congress has left no room for the King-Thompson Act.

II. THE KING-THOMPSON ACT ABRIDGES FEDERAL RIGHTS CONFERRED BY THE FOURTEENTH AND THIRTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. Prohibition of a Utility Strike, Without Substituting a Compensating Equivalent for It, Offends Due Process

It is no doubt true, and we do not contest, that "neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." *Dorchy v. Kansas*, 272 U.S. 306, 311. It is equally true, and we think it is incontestable, that while the right to strike is not absolute, neither is the power to prohibit it absolute. Whether the particular prohibition transgresses the guarantee of due process is to be tested by the conventional standard "that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525.¹⁵

¹⁵ How little it advances the solution of the problem to state that the right to strike is not absolute is evident from the circumstances appearing in the cases in which the statement is made.

The premise from which analysis begins has been aptly stated (Cox, Cases on Labor Law, 812 (3d ed. 1954)):

On principle it would seem that the interest of employees in freedom to strike is cognizable under the Fifth and Fourteenth Amendment. Recourse to a strike involves the withholding of personal service and the association of individuals into a group. Withholding personal service is surely an exercise of "liberty" in the constitutional sense; and although the point is not clear on the decisions, the concept seems broad enough to include freedom of association.¹⁶ The fact that the strike is a weapon—a form of self-help—used to advance the workers' interest in wages, hours and other terms and conditions of employment does not militate against the claim to some degree of constitutional protection. A constitution which assures the owner of property an opportunity to obtain a reasonable return on his capital surely must recognize the worker's interest in the conditions under which he labors and the price he receives for his work. And, as Mr. Chief Justice Taft observed years ago, modern industrial organization makes the worker's opportunity to improve his wages and conditions of employment dependent upon associa-

Thus, in *Dorchy v. Kansas*, 272 U.S. 306, the state statute was held not unconstitutional as applied because the strike was for the impermissible purpose of collecting a state claim due a fellow member of the union who was formerly employed in the business. In *U.A.W. v. W.E.R.B.*, 336 U.S. 245, the prohibited activity consisted of unannounced "quickie" work stoppages for unstated ends, and the authority of that case has been sharply dissipated if not altogether dispelled. *N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477, 493, n. 23.

¹⁶ If there ever had been, there is now no doubt that due process protects freedom of association. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460-467.

tion and collective bargaining backed by freedom to strike.

"A single employee was helpless in dealing with an employer. He was dependent upon his daily wage for the maintenance of himself and his family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. Each united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with him." [*American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209.]

The indispensability of the right to strike to preservation and enhancement of the employee's working welfare is underscored by the fact that without the backing of the strike collective bargaining is a nullity. Collective bargaining is a combination of pressure and persuasion, but the capacity to persuade draws its power from the economic strength which can be mustered to support the argument. As this Court has stated, the "strike threat . . . , together with the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory agreements." *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 291.

Accordingly, in this case, when Missouri prohibits public utility employees from striking, it cripples their ability through collective bargaining to induce their employer to grant satisfactory terms. Collective bargaining without the right to strike is just talk. The employer is free to dictate his own terms because his employees have no means by which to induce him to yield to theirs. The State has deprived them of their

power by "withholding their labor of economic value to make him pay what they thought it was worth." *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209.

This is a deep incursion into economic liberty. It is no answer to say, as the court below does, that the "only limitation upon an employees' strike or a company's lockout is if the public interest is endangered," so that the "King-Thompson Act does not abolish the right of utility employees to strike, but only subordinates the right to the public interest." *Missouri v. Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309, 321, 323. Barring superseding federal law or the independent operation of the Commerce Clause (*supra*, p. 30, n. 4), one may grant a valid state interest in safeguarding the community from imminent jeopardy caused by interruption of utility services. But protection of that interest, if it can justify it at all (see *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522), can justify abolition of the strike only if a compensating equivalent is substituted for the strike. Whatever reasonable alternatives to a strike which a legislature may choose, the alternative which is not available is destruction of the employees' interest. For it is precisely that which renders the King-Thompson Act "unreasonable, arbitrary, . . . capricious. . . ." *Nebbia v. New York*, 291 U.S. 502, 525.

Of course the Constitution does not permit the judiciary to choose from among rational alternatives that one which it thinks is best-suited. But it does require, when the legislature selects an irrational means, that such means shall be stricken down. Any state interest in uninterrupted utility service can be fully satisfied by substituting a rational alternative for the strike.

But to abolish the strike, and substitute nothing in its place, relegates the public utility worker to economic servility in his relations to his employer. No state interest exists which justifies this subservience.

And so, as Mr. Justice Brandeis observed, the legislature, "while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." Dissenting in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488, cited with approval, *U.A.W. v. W.E.R.B.*, 336 U.S. 245, 252, 259; *Thornhill v. Alabama*, 310 U.S. 88, 104. But a fatal defect in what Missouri has done is that it has not substituted "processes of justice." It has forbidden the fight, and left the field to the employer. A statute is arbitrary and capricious, and therefore unconstitutional, when it jettisons the interest of the employees in a fair wage and working conditions by depriving them, without any compensating equivalent, of their only effective weapon in the competition over the division of the joint product of capital and labor.

It wholly elides the issue to say, as the court below does, that appellants simply "are enjoined from striking against the State during state operation of the utility" (R. 191, italics in original), so that the "right to strike is not in question in this case as 'the right to strike' is generally understood, to wit, against a private employer" (R. 190). The State operates nothing; state possession is fictive; seizure is a crude camouflage which prohibits the strike but does nothing else. In the frank words of the Chairman of the Missouri State Board of Mediation, "employees may not strike to close down a public utility" (R. 60). No repetitive incantation of the State's paper possession can conceal or palliate the stark issue posed by this fiat.

B. Prohibition of a Utility Strike, Without Substituting a Compensating Equivalent for It, Results in Involuntary Servitude

The Thirteenth Amendment prohibits "involuntary servitude." The prohibition is of course not confined to the abolition of slavery but has a broader purpose. It is designed "to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." *Bailey v. Alabama*, 219 U.S. 219, 241. Its "undoubted aim" is "to maintain a system of completely free and voluntary labor throughout the United States." And "in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." *Pollock v. Williams*, 322 U.S. 4, 17-18.

In this case, to prohibit utility employees from striking, without substituting a compensating equivalent for the strike, brings about precisely the situation where "the master can compel and the laborer cannot escape the obligation to go on," with the result that "there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." In the industrial world of the twentieth century this is involuntary servitude. To be sure, section 295.210 of the King-Thompson Act states that the worker can quit, and so that court below can verbally aver that the statute "is directed against a strike or concerted refusal to work and has nothing to do with one or more quitting work of their own volition." *Missouri v. Local No. 8-6, Oil, Chemical & Atomic*

Workers Union, 317 S.W. 2d 309, 325. But this involution blinks economic reality. The worker can quit only if there is other work he can find. A few may find other employment, but for the mass of the employees there is no realistic alternative to remaining on the job. And this is especially true of the worker with substantial service with the particular employer. Increasing length of service means greater benefits based on seniority. To illustrate by the expired agreement between the Company and the Union in this case (def. ex. 5): seniority governs the order of layoff and recall (Art. I, § 11, p. 12); wages increase with length of service (Art. IV, § 1, p. 30); pensions and disability allowances depend on continuous unbroken service (Art. I, § 16, Sched. 1, pp. 17, 43); seniority determines the length of vacations (Art. I, § 15, p. 15); priority in bidding jobs and picking choice runs is based on seniority (Art. II, §§ 19, 20, Art. III, §§ 3, 9, pp. 29, 30, 33, 35); and tool allowances and extra work are determined by seniority (Art. ~~II~~ I, §§ 4, 6, pp. 34, 35). An employee with substantial service is therefore free to quit but only if he is willing to surrender his equity in his seniority and start from scratch with another enterprise.

And so the freedom to quit is hollow. The hard fact is that employees who are prohibited from striking are compelled by economic exigency to stay on the job on the employer's terms. This is involuntary servitude in today's world.¹⁷

¹⁷ The statements of the court below (R. 190-192) that appellants' claims based on the Thirteenth and Fourteenth Amendments were not presented to the trial court are wholly without merit for the reasons stated in full at note 10, page 29, of the Jurisdictional Statement to which the Court is respectfully referred.

III. THE CASE IS NOT MOOT

On January 8, 1963, appellee transmitted to the Court a certified copy of an Executive Order issued by the Governor of Missouri under date of December 28, 1962, vacating the seizure of the property of the Company "effective at 11:59 P.M. o'clock, on Saturday, January 12, 1963." Appellee stated that the injunction ceases to have operative effect upon the vacation of seizure.¹⁸ It also stated that it had informed the Court of the forthcoming vacation of seizure because that action has a "material bearing" upon the appeal pending before the Court. Appellee did not otherwise explain its position. On January 10, 1963 appellants wrote to the Clerk of the Court resisting the suggestion of mootness implicit in appellee's statement. On January 14, 1963 the Court noted probable jurisdiction rather than postpone consideration of the question of jurisdiction to the hearing of the case on the merits. Anticipating that appellee will pursue its suggestion of mootness, we treat with the question.

1. This case presents the third time that, as a result of seizure of the property of the Company upon a threatened stoppage by the Union, state power has been interposed to prevent the employees from striking to enforce their economic demands. The first seizure

¹⁸ Appellee nevertheless contemporaneously applied to the Circuit Court of Jackson County, Missouri, for an order dissolving the injunction and dismissing the petition. Appellants suggested to that court that it was without power to dissolve the injunction and dismiss the cause during the pendency of the appeal to this Court. *Nelson v. Consolidated Gas Co.*, 258 U.S. 165, 177; *In re Allen*, 115 F. 2d 936, 939; *C.P.A. v. cf. United States v. Frank B. Killian Co.*, 269 F. 2d 491, 494 (CA 6); 7 Moore's Federal Practice ¶ 73.12 (2d ed.) and that court has not acted on the request to dissolve and dismiss.

lasted from April 1950 to December 11, 1950, a period of eight months (R. 73); the second seizure lasted from November 6, 1957 to March 6, 1958, a period of four months (R. 73); the third and instant seizure lasted from November 13, 1961 to January 12, 1963, a period of fourteen months; the longest in the history of the King-Thompson Act. The six other seizures of other public utilities have been of similarly limited duration, lasting from a minimum of eleven days to a maximum of forty-three weeks (R. 195). Injunctions predicated on seizure are therefore inherently short term in character. Were the termination of seizure to preclude inquiry into the legality of the injunction based on it, the power to seize would be forever immunized against final judicial determination of its validity. This Court has closed the door to the possibility. The validity of short term orders, manifesting a continuing exertion of power as occasion for its exercise arises, remains subject to judicial review notwithstanding termination of the particular order. "The questions involved in the orders . . . are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review. . . ." *Southern P. Terminal Co. v. I.C.C.*, 219 U.S. 498, 515.¹⁹

¹⁹ See also, *Southern Pacific Co. v. I.C.C.*, 219 U.S. 433, 452; *McGrain v. Daugherty*, 273 U.S. 135, 180-182 (A proceeding to test the power of a congressional investigating committee is not mooted by the expiration of the particular Congress that created the committee where the investigation has not been completed and the committee may be revived by motion at any time); *Leonard v. Earle*, 279 U.S. 392, 398 (Mandamus action to compel the issuance of a license granted only on an annual basis is not moot where plaintiff intends to continue in business).

The decisions in the Courts of Appeals are particularly instructive. *Technical Radio Laboratory v. F.C.C.*, 36 F. 2d 111, 113

2. The Executive Order vacating the seizure recites that "the labor dispute between" the Company and the Union "remains unresolved. . . ." This is the first time in the history of the King-Thompson Act that seizure has been lifted although the underlying economic controversy is still unsettled. The action was taken notwithstanding the provision of section 295.180 of the King-Thompson Act that the seized "utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable *after* the settle-

(C.A.D.C.) (Appeal from denial of an application to renew a three-month station license heard and decided after the period for which the license might have been issued had expired, the court noting that to moot the controversy because the particular license period had expired "would practically nullify the right of appeal" by reason of the shortness of time and that at issue was not only the particular license but a "continuing right to apply . . . for successive renewals . . ."); *Yarnell v. Hillsborough Packing Co.*, 70 F. 2d 435, 438 (C.A. 5) (Action not mooted by revocation of particular prorate orders on eve of hearing without admitting the illegality of the orders or disclaiming an intention to reinstate the orders or make others of similar import); *Gay Union Corp. v. Wallace*, 112 F. 2d 192, 195 (C.A.D.C.), cert. denied, 310 U.S. 647 (Appeal from denial of an application to participate in allotment of sugar made on an annual basis decided after expiration of the yearly period, since similar denial "seems not unlikely" to occur in succeeding years and, "in the very nature of things, it will be again impossible to secure a court review and obtain a decision before the end of the allotment period"); *Dyer v. S.E.C.*, 266 F. 2d 33, 46-47 (C.A. 8) (Review of SEC order approving proxy statement heard and decided after the annual meeting had been held for which statement was prepared, where the underlying fight is continuing and it is "impossible practically" to obtain judicial review before the annual meeting is held); *Application of Cotton*, 291 F. 2d 487, 492 (C.A. 2) (Contest on appeal over the power to seek certain information by subpoena not mooted by abandoning the particular subpoena which had been contested and issuing another subpoena); *Pan American World Airways, Inc. v. C.A.B.*, 300 F. 2d 904, 905 (C.A.D.C.) (Review of "seasonal exemptions" not mooted by expiration "as the problem is a recurring one").

ment of said labor dispute . . ." (emphasis supplied).²⁰ And seizure was vacated despite the absence of any change in the situation which originally persuaded the Governor to institute it.

* Vacation of seizure where nothing has changed gives no assurance that a resumed strike would not after a few days be again illegalized by a fresh institution of seizure.²¹ At this writing the labor dispute is still unsettled. To call a strike now would recreate the exact situation which prevailed on November 13, 1961, when

²⁰ "The Missouri law provides that the seizure shall be terminated when the dispute is settled." Missouri State Board of Mediation, *Twelve Years Under the King-Thompson Act, 1947-1959*, 20 (1959). Nevertheless, the court below opined that seizure could be vacated without awaiting the settlement of the labor dispute (R. 183, 184), erroneously stating that the "Act as construed by officials of this State in administering it show that the Governor may release the control of a utility's physical property at any time after seizure. (See Appendix A and Appendix B set out at the close of this opinion)." (R. 183). There had been no such construction and nothing in either appendix remotely suggests that seizure had ever before been vacated short of settlement. Constitutional questions aside, a state court is of course free to mangle the interpretation of its own state statute as it pleases.

It may be added that Appendices A and B are *ex parte* representations made by the Chairmen of the Missouri State Mediation Board which appellee appended to its brief in the court below. Appendix A errs in stating that in 1956 and 1957 a strike was "started" by the Union against the Company (R. 195). A strike was threatened, and as a result seizure was invoked, but no actual strike occurred on either previous occasion (R. 73-74, 87, 93). There may be other errors in the appendices of which we are unaware.

²¹ According to a newspaper account, when asked whether he would "seize the utility again" if the Union "strikes after the company is returned," the Governor of Missouri replied, "We'll cross that bridge when we get to it, if that does occur. . . ." *Kansas City Star*, Dec. 28, 1962.

the Union first struck. Nothing has altered. No single differentiating feature exists. The requisite jeopardy by state standards to "public interest, health and welfare" then thought to obtain would be no less manifest now. Unless sheer caprice rules the administration of the King-Thompson Act, a renewed strike simply augurs renewed seizure.

It would make no difference even if the present labor dispute were settled. For upon any future dispute between the Company and the Union seizure would again be invoked in the event of an actual or threatened strike. The presently vacated seizure is the third of a series of identical acts in a continuing course of conduct. Its lifting does not result from any renunciation of the underlying claim to the right and power to impose it. The power to seize remains fully available to serve again, with full intention to resort to it again. Each act of seizure is but a particular manifestation of a continuing course of conduct, to be forthwith resumed upon every succeeding threatened or actual strike by the Union against the Company.

Remission of the wrong, to erupt again as soon as occasion requires, does not terminate the controversy. "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the cause, *i.e.*, does not make the case moot. . . . A controversy may remain to be settled in such circumstances. . . . *e.g.*, a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632. "To disarm the court it must appear that there is no reason-

able expectation that the wrong will be repeated." *United States v. Aluminum Co. of America*, 148 F. 2d 416, 448 (C.A. 2).

3. This case thus combines the twin elements of a short term order and likelihood of repetition each of which independently precludes a conclusion that the controversy has been mooted. Otherwise offenders "could take advantage of the other party and prevent an appellate court from ever deciding upon the legality of their conduct by limiting the effective period of their orders or discontinuing their conduct at the crucial time." *Meyers v. Jay Street Connecting Railroad*, 288 F. 2d 356, 360 (C.A. 2). These reasons are joined in this case by "a public interest in having the legality of the practices settled. . . *United States v. W. T. Grant Co.*, 345 U.S. 629, 632.²² For while "public interest" in the resolution of a controversy will not of itself suffice to keep a case alive if the controversy is otherwise definitely ended, "public interest" is a strong influence where other factors also serve to show the continuity of the controversy.²³

The public interest is especially manifest in this case. The King-Thompson Act was passed in 1947. During the sixteen years since its enactment seizure has been invoked nine times to bar employees of public utilities from striking to enforce their demands in collective bargaining (R. 195). Throughout this time all negotiations involving public utility employees have been conducted by their unions under the disability of the pervasive threat of seizure precluding recourse to

²² See also, *McGrain v. Daugherty*, 273 U.S. 135, 182; *Dyer v. S.E.C.*, 266 F. 2d 33, 47 (C.A. 8).

²³ *Diamond, Federal Jurisdiction To Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 138 (1946).

a strike. And, throughout this time, to say the least, grave doubt as to the validity of this actual or apprehended exertion of state power has existed. It is indispensable that all concerned with the enforcement of the King-Thompson Act—the public utility employees, the employers for whom they work, the unions which represent them, and the public—finally know whether their affairs are being ordered in accordance with a valid enactment.

Notwithstanding dominating public interest in determination of the controversy, appellee is bent upon eluding a test of the validity of the power it wields. Seizure was vacated almost at the very moment of initial consideration of the appeal by this Court. Nothing but the appeal seems to account for it.²⁴ If such precipitate action can undo the appeal there remains no way by which to test the validity of the King-Thompson Act consistent with compliance with the injunction while it is in force. Despite maximum diligence in managing the litigation recourse to the Court through normal channels is closed.²⁵ Yet it is

²⁴ See *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, n. 5.

²⁵ From the filing of the petition for injunction in the trial court on November 15, 1961, through affirmance of the judgment by the court below on October 8, 1962, a total of 46 weeks elapsed. Of this 46 weeks, fully 26 weeks, or more than half of the total time, was consumed in waiting for judicial decision after counsel had fully concluded their presentation. Thus, at the end of the first day of trial on November 27, 1961, the trial judge stated that he intended "to rule on this quite expeditiously" (R. 65). His expeditious ruling was rendered on February 12, 1962 (R. 128), eleven weeks later and more than seven weeks after the last document was filed with the court on December 22, 1961 (R. 127). In the court below, notwithstanding appellants' efforts to secure an expedited appeal (R. 150-157), from the time of the submission of the last document to it dated May 28, 1962 (R. 201) to rendition of decision on October 8, 1962, nineteen weeks elapsed.

beyond peradventure clear that appellee does "intend to enforce this state statute until its unconstitutionality has been finally adjudicated." *Evers v. Dwyer*, 358 U.S. 202, 204. Vacation of seizure is not an act of contrition, a confession of error, but a device to frustrate adjudication. The public interest in a determination of the controversy is joined by the public interest in scotching manipulation to prevent it.

4. Neither *Harris v. Battle*, 348 U.S. 803, nor *Local No. 8-6, Oil, Chemical & Atomic Workers Union v. Missouri*, 361 U.S. 363, is apposite. Unlike either of those cases, in this case at this writing the underlying economic dispute still remains unsettled. In *Harris*, before the prayer for permanent relief against seizure even came before the *nisi prius* state court for hearing, the labor dispute had been settled, the strike had been called off, and the seizure had been lifted.²⁶ In *Local No. 8-6*, less than a month elapsed between seizure and settlement (361 U.S. at 365-366), and the decree of the Circuit Court from which appeal was taken to Missouri Supreme Court had not been finalized until *after* settlement.²⁷ In this case the appeal came to this Court

²⁶ The strike began on December 10, 1952; an agreement was reached on January 12, 1953; seizure was vacated on February 5, 1953; the bill for a permanent injunction or declaratory judgment was heard on May 12, 1953 by the Circuit Court of City of Richmond, Virginia; that court denied injunctive relief and declared the state action valid on June 12, 1953; the Supreme Court of Appeals of Virginia on January 27, 1954, declined to hear the merits of the appeal, "the court being of opinion that there no longer exists a justiciable issue to be determined by this court. . . ." Statement of appellees opposing jurisdiction and motion to dismiss, 4-5, Statement as to jurisdiction, 6-10, 14, *Harris v. Battle*, 348 U.S. 803, October Term, 1954, No. 111.

²⁷ Record, 294-295, 311-312, October Term, 1959, No. 42.

with the economic dispute still unsettled and the controversy as fully alive as the day it started.

Furthermore, independently of the continuing currency of the underlying dispute, *Harris and Local No. 8-6* are amply distinguishable even if the dispute were settled. On the particular records in those cases it could be thought that judicial intercession need not anticipate a future recurrence of the wrong but could await its actuality. This basis for judgment is not entertainable in this case. It is now clear that, if vacation of seizure in the course of litigation can of itself moot the case, there is no way a person aggrieved by application of the King-Thompson Act can reach this Court to test its validity by appeal from a permanent injunction. Until this case it was possible to believe that an aggrieved person could secure eventual vindication of his federal rights if he had the fortitude to endure the wrong until the litigation had run its course. But even that hard road would now be closed. For appellee can at any time stop the aggrieved person in his tracks by the simple expedient of vacating seizure despite the absence of settlement and in that uncontrollable way bring the action to a standstill. No case could survive unless appellee chose that it should survive. The key to the Court would be in appellee's pocket. It goes without saying that the requirement that a federal court adjudicate only a live case cannot be manipulated into a power in an offender to decide for himself when if ever he chooses to be brought to judgment.

The reality of this case is the antithesis of mootness. Vacation of seizure means only that appellee chooses to run a little bit today in order to be sure that he will not be prevented from fighting another day. The par-

ties remain in the toils of a live dispute in which their positions are sharply adverse and the need for decision exigent.

CONCLUSION

For the reasons stated, the judgment should be reversed and the cause remanded with instructions to dismiss the petition for injunction as beyond the power of the state court to entertain.

Respectfully submitted,

BERNARD CUSHMAN
5025 Wisconsin Avenue, N. W.
Washington, D. C.

BERNARD DUNAU
912 Dupont Circle Building
Washington 6, D. C.

JOHN MANNING
3333 Warwick Boulevard
Kansas City, Missouri

Attorneys for Appellants

March, 1963.

APPENDIX A

THE KING-THOMPSON ACT

Chapter 295, RSMo 1949

PUBLIC UTILITY LABOR DISPUTES
MEDIATION AND SEIZURE

295.010. *Labor relations affecting public utilities—state policy.*—It is hereby declared to be the policy of the state that heat, light, power, sanitation, transportation, communication, and water are life essentials of the people; that the possibility of labor strife in utilities operating under governmental franchise or permit or under governmental ownership and control is a threat to the welfare and health of the people; that utilities so operating are clothed with public interest, and the state's regulation of the labor relations affecting such public utilities is necessary in the public interest. (L. 1947 V. I p. 358 § 1)

295.020. *Definitions.*—1. The term "*public utility*" shall include any person engaged in the business of producing, distributing, selling or otherwise furnishing electric light or power, heat, gas, steam, water, sewer service, transportation excepting railroads, communication, or any one or more of them to the people of Missouri.

2. The term "*person*" means any individual, firm, co-partnership, corporation, municipal corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

3. The term "*representative*" means any person or persons, labor union, organization, or corporation designated either by a utility or group of utilities or by its or their employees to act or do for them.

4. The term "*collective bargaining*" shall be understood to embody the philosophy of bargaining by employees through representatives of their own choosing, and shall

include the right of representatives of employees' units to be consulted and to bargain upon the exceptional as well as the routine wages, hours, rules, and working conditions.

5. The term "*labor dispute*" shall involve any controversy between employer and employees as to hours, wages, and working conditions. The fact that employees have amicable relations with their employers shall not preclude the existence of a dispute among them concerning their representative for collective bargaining purposes.

6. The term "*employee*" shall refer to anyone in the service of another, actually engaged in or connected with the operation of any public utility throughout the state.

7. The term "*board*" shall mean the state board of mediation. (L. 1947 V. I p. 358 § 2)

295.030. *Governor to appoint state board of mediation—members—qualifications—terms—vacancy.*—1. Within thirty days after the effective date of this chapter the governor, by and with the advice and consent of the senate, shall appoint five competent persons to serve as a state board of mediation; two of whom shall be employers of labor, or selected from some association representing employers of labor, and two of whom shall be employees holding membership in some bona fide trade or labor union; the fifth shall be some person who is neither an employee nor an employer of labor and who shall be chairman of said state board of mediation.

2. Two members of said board shall be appointed for one year, two for two years, and one for three years, and all appointments thereafter shall be for three years or until their respective successors are appointed in the manner herein provided.

3. If a vacancy occurs in said board by death or otherwise, at any time, the governor shall appoint some compe-

tent person having the same qualifications as his predecessor to fill the unexpired term. (L. 1947 V. I p. 358 § 3)

295.040. *Oath of members—main office—meetings.*—Each member of said board shall, before entering upon the duties of his office, take and subscribe an oath to support the Constitution of the United States and this state and to demean himself faithfully in his office. The main office of the state board of mediation shall be in Jefferson City, but the board may hold meetings at any time or any place in the state whenever the same shall become necessary, and three members of the board shall constitute a quorum for the transaction of business. (L. 1947 V. I p. 358 § 4)

295.050. *Duties of chairman.*—The chairman of the board shall devote his full time to his duties and shall have charge of the office of the board. He shall keep all records of the proceedings of the board, and shall supervise the work of the employees of the board, and shall have such other powers and duties as may be conferred, or imposed upon him by the board. (L. 1947 V. I p. 358 § 5)

295.060. *Compensation and expenses of board members.*—The chairman of the board shall receive a salary of five thousand dollars per annum, payable monthly; each of the other members of the state board of mediation shall receive fifteen dollars per day for the time spent in the performance of their duties. All members shall receive traveling and other expenses incurred in the performance of their duties. (L. 1947 V. I p. 358 § 6)

295.070. *Powers and duties of board.*—1. The state board of mediation shall have power to employ and fix the compensation of conciliators and other assistants and to delegate to such assistants such powers as may be necessary to carry out its duties under this chapter. The board shall by regulation prescribe the methods of procedure before it.

2. The board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the pro-

duction of evidence which relates to any matter under investigation by the board. In cases of refusal to obey a subpoena issued by the board the circuit court of Cole county or of any county where the person refusing to obey such subpoena may be found, on application by the board, shall have power to issue an order requiring such person to appear before the board and to testify and produce evidence ordered touching the matter under investigation, and any failure to obey such order shall be punished by the court as a contempt thereof. (L. 1947 V. I p. 358 § 7)

295.080. *Labor disputes—action by board.*—1. Upon receipt of notice of any labor dispute between parties subject to this chapter, the board shall require such parties to keep it advised as to the progress of negotiations therein.

2. Upon application of either party to a labor dispute or upon its own motion the board may fix a time and place for a conference between the parties to the dispute and the board or its representative, upon the issues involved in the labor dispute and shall take whatever steps it deems expedient to bring about a settlement of the dispute including assisting in negotiating and drafting a settlement agreement.

3. It shall be the duty of all parties to a labor dispute to respond to the summons of the board for joint or several conferences with it or with its representatives and to continue in such conference until excused by the board or its representative. (L. 1947 V. I p. 358 § 8)

295.090. *Labor agreements—renewal.*—All collective bargaining labor agreements hereafter entered into between the management of a utility and its employees or any craft or class of employees shall be reduced to writing and continue for a period of not less than one year from the date of the expiration of the previous agreement entered into between the management of the utility and its employees or if there has been no such previous agreement then for a period of not less than one year from the date of the actual

execution of the agreement. Such agreement shall be presumed to continue in force and effect from year to year after the date fixed for its original termination unless either or both parties thereto inform the other, in writing, of the specific changes desired to be made therein and shall also file a copy of such demands with the state board of mediation, at least sixty days before the original termination date or sixty days before the end of any yearly renewal period, or sixty days before any termination date desired thereafter. (L. 1947 V. 1 p. 358 § 10)

Sec. 295.100. *Changes in Labor Agreement—Notice.*—

1. In the case of all existing labor contracts, agreements or understandings which do not provide for at least a sixty-day notice of desired changes and which contracts, agreements or understandings terminate after seventy days following the effective date of this chapter, the parties thereto shall nevertheless inform, in writing, the other party or parties of any specific changes desired to be made in said contract, agreement or understanding and file a copy of such desired changes with the state board of mediation at least sixty days before the date fixed for the termination of said contract, agreement or understanding.

2. In the case of labor contracts, agreements or understandings terminating within seventy days after this chapter shall become effective, the parties thereto shall forthwith, or not later than ten days after the effective date of this chapter, inform the other party, in writing, of the specific changes desired to be made in said contract, agreement or understanding and promptly file a copy of such demands with the state board of mediation.

Sec. 295.110. *Changes in Employment Terms in Absence of Labor Contract.*—Whenever, after the effective date of this chapter, a situation exists in any utility whereby employees are rendering services under terms and conditions which were not at the time this chapter becomes effective and which have not heretofore been the subject of the con-

tract, and said employees desire to effectuate a change in the terms of employment or a utility desires to effectuate a change in said terms of employment, then and in that event, it shall be the duty of the party desiring such change, not less than sixty days prior to the desired effective date thereof, to inform the other party in writing of the specific changes so desired in the manner in which they are desired, either by written contract or otherwise and to file a copy of such terms with the state board of mediation.

295.120. *Public hearing panel—members—powers—hearings.*—1. In the event that management of a utility and the representatives for collective bargaining purposes of any craft or group of employees of such utility shall not have reached and executed a final agreement in writing as to all conditions of employment affecting such employees on or before the termination date of any existing contract, agreement or understanding, or any renewal thereof, or unless the parties shall have, before said date, agreed to submit any and all disputes between them to arbitration, the management of such utility and the representatives of such employees shall, within five days after such termination date, each designate, in writing, a person as a public hearing panel member and file such designation with the state board of mediation; the two persons so designated shall choose a third disinterested and impartial person and these three shall compose and act as a panel.

2. The panel shall promptly proceed and within fifteen days following their designation hold and complete public hearings on the specific changes so requested, to the contract, agreement or understanding. Such period of fifteen days may be extended by mutual written consent of the parties. The panel shall give to each party full notice and opportunity to be heard, but the failure of either party to appear before the panel at the time and place fixed by it shall not deprive the panel of jurisdiction to proceed to a hearing and to make report thereon as herein provided.

(L. 1947 V. I p. 358 § 14)

295.130. *Appearance in person or by counsel—notice of hearing.*—Parties may be heard either in person or by counsel as they may elect, and the panel shall give due notice of all hearings to the employee or employees or their representatives and the public utility or utilities involved in the labor dispute. (L. 1947 V. I p. 358 § 15)

295.140. *Selection of party representatives.*—Representatives for the purposes of this chapter shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other. Representatives of employees for the purpose of this chapter need not be persons in the employ of the utility. (L. 1947 V. I p. 358 § 16)

295.150. *Report of hearing to governor.*—Within five days after closing such hearings the panel shall file with the governor, in writing, a report setting forth a statement of the controversy, a resume of the evidence submitted to it and its recommendations based thereon. (L. 1947 V. I p. 358 § 17)

295.160. *Appointment of representatives by board when not designated by parties.*—1. In the event either management of the utility involved or the representatives of the employees for collective bargaining purposes shall fail or neglect to designate, as herein provided, such a person to represent it upon the panel or the two so designated shall fail to agree upon the third member of the panel, within ten days after the date fixed for the termination of such contract, agreement or understanding or upon failure to file such designations or any of them with the state board of mediation within said ten-day period, the state board of mediation shall appoint such person or persons, selecting in each case a person qualified by previous experience or employment to represent employers, employees or the public as the case may require.

2. Should both management and the representatives of the employees fail or neglect to designate representatives

upon said panel within the time herein required, then the state board of mediation shall appoint a panel of three persons, to be selected as follows: one to represent management of the utility, giving the management forty-eight hours to select its preference from a list of five persons submitted by the board to the management before designating such person; one to represent the employees involved, giving their representative forty-eight hours to select their preference from a list of five persons submitted by the board to such representative, before designating such person; and one to act as the impartial third person. Failure on the part of either party to make such selection shall not prevent the board from appointing the members of the panel from the lists submitted. (L. 1947 V. I p. 358 § 18)

295.170. *Proceedings Not to Supersede Voluntary Arbitration.*—Compulsory arbitration, as provided in this chapter shall not be effective in disputes where voluntary arbitration is a part of the contract between the disputing parties. In the event that through the voluntary arbitration disputing parties cannot agree, the state board of mediation shall then enforce the compulsory arbitration as provided.

295.180. *Utility strike—power of governor.*—1. Should either the utility or its employees refuse to accept and abide by the recommendations made pursuant to the provisions of this chapter and as a result thereof the effective operation of a public utility be threatened or interrupted, or should either party in a labor dispute between a utility and its employees, after having given sixty days' notice thereof, or failing to give such notice, engage in any strike, work stoppage or lockout which, in the opinion of the governor, will result in the failure to continue the operation of the public utility, and threatens the public interest, health and welfare, or in the event that neither side has given notice to the other of an intention to seek a change in working conditions, and there occurs a lockout, strike or work stop-

page which, in the opinion of the governor, threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare, then and in that case he is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest.

2. Such power and authority may be exercised by the governor through such department or agency of the government as he may designate and may be exercised after his investigation and proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of a labor dispute, a threatened or actual strike, a lockout or other labor disturbance, and that the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility; provided, that whenever such public utility, its plant, equipment or facility has been or is hereafter so taken by reason of a strike, lockout, threatened strike, threatened lockout, work stoppage or slowdown, or other cause, such utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable after the settlement of said labor dispute, and it shall thereupon be the duty of such utility to continue the operation of the plant facility, or equipment in accordance with its franchise and certificate of public convenience and necessity. (L. 1947 V. I p. 358 § 19)

295.190. *Governor to prescribe rules and regulations.*—The governor is authorized to prescribe the necessary rules and regulations to carry out the provisions of this chapter. (L. 1947 V. I p. 358 § 20)

295.200. *Unlawful acts—penalties—enforcement of provision.*—1. It shall be unlawful for any person, employee, or representative as defined in this chapter to call, incite, support or participate in any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state under

this chapter, as means of enforcing any demands against the utility or against the state.

2. It shall be unlawful for any public utility to employ any person or employee who has violated paragraph 1 of this section except that such person or employee may be employed only as a new employee.

3. Any labor organization or labor union which violates paragraph 1 of this section shall forfeit and pay to the state of Missouri for the use of the public school fund of the state, the sum of ten thousand dollars for each day any work stoppage resulting from any strike which it has called, incited, or supported, continues, to be recovered by civil action in the name of the state and against the labor organization or labor union in its commonly used name.

4. Any officer of any labor organization or labor union representing employees of public utilities who participates in calling, inciting or supporting any strike in violation of paragraph 1 of this section shall forfeit and pay to the state of Missouri, for the use of the public school fund of the state, the sum of one thousand dollars to be recovered by civil action in the name of the state and against such officer.

5. Any public utility that engages in a lockout which brings about a work stoppage shall forfeit and pay to the state of Missouri, for the use of the public school fund of the state, the sum of ten thousand dollars for each day of work stoppage caused by such lockout, said amount to be recovered by civil action in the name of the state and against the public utility, provided further, that if upon any investigation, supported by competent evidence by the state board of mediation, it shall appear that any public utility has refused to bargain collectively in good faith with its employees over the terms and conditions of employment, said state board of mediation shall certify such

record and proceedings to the public service commission, and, upon consideration of the facts in such record and proceedings the public service commission shall find that the evidence justifies such action, it may revoke the certificate of convenience and necessity of such public utility, or impose such other conditions upon such public utility as may be provided by law. Any such action by said public service commission shall be subject to review in the courts of this state in the same manner as other orders or decisions of said commission.

6. The courts of this state shall have power to enforce by injunction or other legal or equitable remedies any provision of this chapter or any rule or regulation prescribed by the governor hereunder. (L. 1947 V. I p. 358 § 21)

295.210 *Meaning of law.*—No employee shall be required to render labor or service without his consent; nor shall anything in this chapter be construed to make the quitting of his labor or services by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent. (L. 1947 V. I p. 358 § 22)

APPENDIX B

Excerpts From Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. § 141, et seq.)

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers

to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening

or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

[SEC. 8] (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any

question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall

not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of section 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

FUNCTIONS OF THE [FEDERAL MEDIATION AND CONCILIATION] SERVICE

SEC. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one of more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a

minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

• • •
NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall

determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-

day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 604.

**DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF
STREET, ELECTRIC RAILWAY AND MOTOR COACH
EMPLOYEES OF AMERICA et al.,**
Appellants,

vs.

STATE OF MISSOURI,
Appellee.

On Appeal from the Supreme Court of the State of Missouri.

BRIEF

**Of the Chamber of Commerce of Metropolitan
St. Louis as Amicus Curiae.**

The Chamber of Commerce of Metropolitan St. Louis, pursuant to Rule 43 (2) and the parties' written consent filed with the Court, files this amicus brief in support of the position of the State of Missouri.

THE INTEREST OF THE AMICUS CURIAE.

The Chamber of Commerce of Metropolitan St. Louis is a corporation organized under the laws of the State of Missouri and has as its purpose the promotion of the commercial, industrial, financial, business, cultural, educational and civic interests of the City of St. Louis and of the St. Louis metropolitan area. The Chamber is not a pecuniary profit-making corporation. It has as its members numerous firms and individuals representing the commercial, industrial, financial and business interests of the City of St. Louis.

The members of the St. Louis Chamber of Commerce are vitally interested in the outcome of this litigation because they are dependent upon the services of the public utilities, including public transportation, for the operation of their businesses. If the State of Missouri does not have the power, under certain emergency circumstances, to take possession of a public utility rendering services to the businesses located throughout the City and County of St. Louis, many of these businesses would be prevented from rendering to the community at large services which the community needs and desires. This amicus believes that the King-Thompson Act plays an important part in continuing the vitality not only of the businesses in the community but also of the public welfare generally which would be endangered if the State could not effectively deal with emergency situations arising in local communities.

Your amicus will confine its argument to the following propositions:

- (1) The present controversy has become moot;
- (2) This Court has always recognized the power of the States to enact emergency legislation and otherwise deal

effectively with emergency situations involving labor disputes;

(3) The King-Thompson law is emergency legislation while the state statute in **Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Wisconsin Employment Relations Board**, 340 U. S. 383 (1951), was not;

(4) Appellants admit that there was an emergency situation present in the case at hand.

ARGUMENT.

I.

The Case is Moot.

After the failure of collective bargaining negotiations between appellants and the Kansas City Transit, Inc., appellants voted to strike effective midnight, November 13, 1961. The Governor of Missouri invoked the King-Thompson Act, and the State of Missouri seized the Transit Company effective 11:59 P. M., November 13, 1961 (R. 163-165). Appellants struck as scheduled, and on November 15, 1961, the State instituted this proceeding to enjoin the strike (R. 167). The Circuit Court of Jackson County, Missouri, issued a temporary restraining order on the same day (R. 7), and on February 12, 1962, it entered a decree enjoining appellants from striking **"against the State of Missouri"** (R. 128). As pointed out in appellants' brief, on December 28, 1962, the Governor of Missouri vacated the seizure by the State of Missouri "effective at 11:59 P. M. o'clock, on Saturday, January 12, 1963". (Appellants' brief at page 75.) Thus, by its own terms, the injunction entered by the trial court, which is the basic order now under review, no longer has any operative effect since it is directed only against striking the State of Missouri and the State no longer is operating the Transit Company. The appellants are now completely free to strike the company; they are under no judicial or legislative restrictions of any kind. Since the issue in this case is appellants' right to strike and since they now have that right, the case is now moot.

A case precisely on point is **Local 8-6, Oil, Chemical and Atomic Workers et al. v. Missouri**, 361 U. S. 363 (1960). That case also involved the Missouri King-Thompson Act. There, the Governor seized the Laclede Gas Company

located in St. Louis, Missouri. Subsequently, an injunction was entered enjoining the union from striking the State. Thereafter, the Governor vacated the seizure, thus causing the injunction to "expire . . . by its own terms." 361 U. S. at 366. In vacating and remanding the case for mootness, this Court held:

"Because that injunction has long since expired by its own terms, 'we cannot escape the conclusion that there remain for this Court no actual matters in controversy essential to the decision of the particular matter before it.' . . . To express an opinion upon the merits of the appellants' contentions would be to ignore this basic limitation [the requirement of an actual controversy] upon the duty and function of the Court, and to disregard principles of judicial administration long established and repeatedly followed.

. . . Any judgment of ours at this late date would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain" (361 U. S. at 367-368, 371).

In this case also, the injunction has expired by its own terms and hence any judgment by this Court "would be wholly ineffectual for want of a subject matter on which it could operate" (361 U. S. at page 371). Accordingly, this litigation is moot.

Appellants argue that the proclamation by the Governor lifting the seizure is merely a device to prevent this Court from ruling on the merits and that he will surely seize the Transit Company again if appellants should go on strike

(Appellants' brief at 78-79, 80, 83). There is not an iota of evidence to support this charge. On the contrary, in the last fifteen years, the Governor has used his seizure powers only nine times in the thirty strikes which have been called against public utilities (R. 194-196), and several of the cases in which there was no seizure involved transportation strikes (R. 196). If appellants were to go on strike tomorrow, there is nothing to indicate that the Governor would invoke the King-Thompson Act.

It should also be emphasized that the King-Thompson law has been interpreted by the Supreme Court of Missouri to be emergency legislation only, and the Governor therefore had a duty to end the seizure when the emergency was over. **Local 8-6, etc. v. Missouri**, 317 S. W. 2d 309, 321 (Mo. 1959). Appellants argue, however, that there has been no change of circumstances between the time of seizure and the time seizure ended, and therefore the only explanation for the Governor's proclamation ending the seizure was a desire to moot this case. There is no evidence to support appellants' assertion that there has been no change of conditions. While we know the conditions existing at the time of seizure, we do not know the local transit conditions existing at the time seizure terminated. It may be that transportation conditions in Kansas City have changed in the last fifteen months so that it will now be possible for appellants to strike without creating an emergency situation. The dearth of evidence on this factual point and the presumption of the validity of the determination by the Governor that there is no emergency (see **Moyer v. Peabody**, 212 U. S. 78 (1909), and **Sterling v. Constantin**, 287 U. S. 378, 399 (1932), and cases there cited) necessitate the conclusion that there has been a change of circumstances and that the emergency no longer exists. It is respectfully suggested that this Court should not hold that the matter is not moot on the basis

of speculation as to what the Governor will do in the event appellants decide to strike. The decisive factor in this case is that the injunction no longer has any operative effect.

II.

This Court Has Always Recognized the Power of the States to Enact Emergency Legislation and Otherwise Deal Effectively With Emergency Situations Involving Labor Disputes.

From **Allen-Bradley Local v. Wisconsin Employment Relations Board**, 315 U. S. 740 (1942), to the landmark case of **San Diego Building Trades Council v. Garmon**, 359 U. S. 236 (1959), this Court has always recognized that the States, under the police power, have the right to enact emergency legislation and otherwise deal effectively with emergency situations involving labor disputes and that such power is in no way pre-empted by federal laws regulating labor-management relations. As the opinion of the Court in **Garmon** pointed out, "Where the regulated conduct touches interests . . . deeply rooted in local feeling and responsibility", this Court will "not infer that Congress has deprived the State of the power to act" (359 U. S. at page 244). The Court went on to remark that "the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." 395 U. S. at 247.

In **International Union v. Wisconsin Employment Relations Board**, 336 U. S. 245 (1949), this Court upheld the power of a state to order a union to cease and desist from instigating certain intermittent and unannounced work stoppages. In so doing, the Court stated that in both the National Labor Relations Act and the Labor Management Relations Act of 1947, "Congress designedly left open

an area for state control.' " *Id.* at page 253, quoting with approval from **Allen-Bradley v. Wisconsin Employment Relations Board**, 315 U. S. 740, 750, 749 (1942). If Congress left open an area which permits the States to enjoin intermittent work stoppages, *a fortiori*, it left open an area which permits the states to enact legislation preventing strikes which jeopardize the local public health and welfare.

Again, in **United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board**, 351 U. S. 266 (1956), this Court upheld the power of the State of Wisconsin to enjoin interference "with the free and uninterrupted use of public ways." *Id.* at pages 268-269. In so doing the Court stated that it "would not interpret an Act of Congress to leave them [the States] powerless to avert such emergencies without compelling directions to that effect." *Id.* at pages 274-275.

By the time of **Youngdahl v. Rainfair, Inc.**, 355 U. S. 131 (1957), the thrust of the rule announced in **Allen-Bradley** and reiterated in **International Union and United Automobile** had been so thoroughly recognized that it was conceded in that case that the State had the right under the police power to control emergency situations. *Id.* at page 138. Thus, in **Youngdahl**, the only question presented was whether there was **in fact** an emergency situation under the circumstances there involved.

The Federal statutes dealing with labor management relations certainly do not manifest an intention by Congress to prevent the states from exercising their historic police power. On the contrary, the Labor Management Relations Act of 1947, 29 U. S. C., Sections 141 et seq., expressly recognizes the need for action in emergency situations. The Act permits strikes to be enjoined when the "national health or safety" is imperiled. 29 U. S. C.,

Sec. 176-178. Surely, a Congress which gave the Federal Government the power to act in national emergencies to protect the national health and safety did not intend to leave the States powerless in local emergencies involving labor disputes to protect the health and safety of a locality.

Thus, consonant with the federal statutes involved, prior decisions of this Court have not precluded, but in fact have allowed, state action in emergency situations. Such action is authorized both because it touches an "interest . . . deeply rooted in local feeling and responsibility" and because the activity in question is not a federally protected activity. See **San Diego Building Trades Council v. Garmon**, 359 U. S. 236, 244, 250 (1959).

III.

The King-Thompson Law Is Emergency Legislation While the State Statute in Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Wisconsin Employment Relations Board, 340 U. S. 383 (1951), Was Not.

The Missouri law here involved is strictly emergency legislation. The King-Thompson Act permits the Governor to take possession of a public utility only where the failure to continue operations of the utility "threatens the public interest, health and welfare." **Mo. Rev. Stat.**, Section 295.180 (1). The Supreme Court of Missouri has specifically held that the law "is strictly emergency legislation." **State v. Local 8-6 et al.**, 317 S. W. 2d 309, 321 (1959); and see the decision of the Court below at R. 188. That interpretation by the Missouri Supreme Court of Missouri law is binding on this Court. See **Allen-Bradley v. Wisconsin Employment Relations Board**, 315 U. S. 740, 747 (1942), and cases there cited. Moreover, it is of special significance that since 1948 the King-Thompson law has been

invoked in only nine of thirty strikes involving public utilities (R. 194-196). This fact demonstrates that the Act is emergency legislation and not public utility anti-strike legislation.

Appellants here seek to invalidate the entire King-Thompson law, relying exclusively on this Court's decision in **Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Wisconsin Employment Relations Board**, 340 U. S. 383 (1951). The statute involved in that case is fundamentally different from King-Thompson. The "Public Utility Anti-Strike Law" of Wisconsin specifically prohibited all strikes by public utilities. As this Court pointedly observed, the Wisconsin Act was not "'emergency' legislation but a comprehensive code for the settlement of labor disputes between public utility employers and employees. Far from being limited to 'local emergencies', the act has been applied to disputes national in scope, and the application of the act does not require the existence of an 'emergency'." *Id.* at pages 393, 394. Under the King-Thompson Act, however, there must be an emergency, and not all strikes of public utilities are prohibited as under the Wisconsin law. In fact, as pointed out above, King-Thompson has been invoked only nine times in the last fifteen years although there have been some thirty strikes involving public utilities.

IV.

Appellants Admit That There Was an Emergency Situation Present in This Case.

It is of particular note that appellants have conceded that there was an emergency situation present under the circumstances of this case, although that is the only question which is appropriate for decision in a case of

this kind (see Point II above and **Youngdahl v. Rainfair, Inc.**, 355 U. S. 131 (1957)). Before the Supreme Court of Missouri, appellants specifically, unequivocally and purposely withdrew their contention made at the trial level that "the actual or threatened strike against the company did not jeopardize the 'public interest, health and welfare' within the meaning of the King-Thompson Act" (R. 168, 169, 171, 172, 173, 174-175). In view of this concession, the Supreme Court of Missouri did not deem it necessary to discuss the question of whether there was an emergency (R. 172). It is clear that an issue which has been specifically waived by a party in the court below may not be considered by this Court on appeal. **United States v. Spector**, 343 U. S. 169, 172 (1952); **Lawn v. United States**, 355 U. S. 339, 362 (note 16) (1958), and cases there cited.

Appellants have thus candidly admitted their disinterest in winning this particular case on the facts presented. Their reason is clear. They want the entire King-Thompson Act declared void so that Missouri may not have the power to regulate any type of labor conduct, regardless of the emergency that may be involved. But under the previous rulings of this Court, States may enact emergency labor legislation (see Point H above), and this explains why this Court has been careful to limit its decisions in this area to a careful analysis of the facts so as to determine whether in fact there is an emergency situation. Compare **Youngdahl v. Rainfair**, 355 U. S. 131 (1957). It is therefore respectfully submitted that since the State of Missouri has the power to enact emergency legislation, since the King-Thompson Act is clearly an emergency law, and since appellants have conceded for the purposes of this case that there was an emergency present, the decision below should be affirmed if the Court reaches the merits.

CONCLUSION.

For all of the foregoing reasons this amicus curiae respectfully urges the Court to dismiss this cause for mootness or, in the alternative, to affirm the judgment below and uphold the validity of the King-Thompson Act on the basis of the issues presented in this case.

Respectfully submitted,

COBURN, CROFT & COOK,

RICHMOND C. COBURN,

ALAN C. KOHN,

411 North Seventh Street,

St. Louis 1, Missouri,

Attorneys for the Chamber of Commerce
of Metropolitan St. Louis, Amicus
Curiae.

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IN THE
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OCTOBER TERM, 1962.

No. 604.

**DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF
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EMPLOYEES OF AMERICA, et al.,**
Appellants,

vs.

STATE OF MISSOURI,
Appellee.

On Appeal from the Supreme Court of Missouri.

BRIEF

Of Laclede Gas Company, Amicus Curiae.

**JAMES M. DOUGLAS,
W. STANLEY WALCH,
EDWIN D. AKERS, JR.,**
705 Olive Street,
St. Louis 1, Missouri,
Attorneys for Amicus Curiae.

THOMPSON MITCHELL DOUGLAS & NEILL,
Of Counsel.

ST. LOUIS LAW PRINTING Co., Inc., 415 N. Eighth Street. Central 1-4477.

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vs.

STATE OF MISSOURI,
Appellee.

On Appeal from the Supreme Court of Missouri.

BRIEF

Of Laclede Gas Company, Amicus Curiae.

**INTEREST OF LACLEDE GAS COMPANY
AND PRELIMINARY STATEMENT.**

This brief is filed by Laclede Gas Company of St. Louis, Missouri (hereinafter called "Laclede"), with the consent of the parties given pursuant to Rule 42 of this Court's Rules.

Laclede is a regulated public utility which distributes natural gas to residential, industrial and commercial consumers in the St. Louis area. Laclede is the only utility which distributes natural gas to the general public in this area which has a population in excess of one and one-half million. Laclede has approximately 383,000 residential customers, and 24,000 commercial and industrial users. Included in its consumers are all the hospitals in the St. Louis area and most of the doctors' offices and clinics. Many of these institutions are dependent upon a constant supply of natural gas to perform their services. Most of Laclede's users are dependent upon natural gas for space heating during the winter months, and the vast majority have no alternate source of heat.

In addition to the foregoing, natural gas is a volatile commodity, which can be dangerous when not properly attended. The record in **Local No. 8-6, Oil, Chemical & Atomic Workers v. Missouri**, 361 U. S. 363, amply demonstrates the dangerous possibilities which exist when Laclede's distribution system is not properly attended because of a strike or lock-out. For these reasons, Laclede is vitally interested in the validity of the seizure-no-strike provisions of a Missouri statute, commonly known as the King-Thompson Act, Chap. 295, R. S. Mo., 1959, which are before the Court in this case.

Since the other briefs amply state the facts, it is not necessary to burden this brief with an additional recitation. Amicus Curiae does, however, believe that it is appropriate briefly to delineate the issues and explain its position with respect to those issues. First, Laclede wants to make it plain that it is supporting the King-Thompson Act because of its interest in protecting the public from an emergency which might be caused by an interruption of gas service. Laclede does not view the King-Thompson Act as a weapon in its labor relations

with its employees nor is it so used. The Appellants' and the A. F. L. - C. I. O.'s briefs have tried to infer (App's. Br. 27-29, 72; A. F. L. - C. I. O. Br. 2-5), that the King-Thompson Act is a labor relations statute which deprives public utility employees of their only effective weapon—i. e., the right to strike. This argument is erroneous. The King-Thompson Act does not deprive utility employees of the right to strike, in all situations. They are only forbidden to strike after the Governor has seized the utility and found that a strike or threatened strike is an immediate threat to the "public interest, health and welfare." § 295.180, R. S. Mo. 1959. Even then the Governor's finding is subject to judicial review and must be supported by substantial facts, see the opinion below, 361 S. W. 2d 33, 49 (R. 184). Laclede has no control over the Governor or the courts; and when a strike begins Laclede does not know if the state will intervene. The Record amply demonstrates this, because it shows that there have been thirty utility strikes in Missouri since the King-Thompson Act went into effect, and that the Governor intervened in only nine of these strikes (361 S. W. 2d 33, 55-56, R. 194-197). Four of these strikes involved Laclede, and the Governor found that an emergency existed in only one instance (361 S. W. 2d 33, 55-56, R. 194-197). Thus, the King-Thompson Act does not, in theory or practice, relieve Laclede of the fear or threat of a strike when it negotiates with its employees.

Furthermore, a strike by Laclede's employees has relatively little effect on the Company aside from the possibilities of danger heretofore mentioned. Laclede does not lose customers because it is a regulated utility and its customers have nowhere else to turn. For these reasons, the Appellants' argument that the King-Thompson Act deprives labor of its most effective weapon—i. e., the right to strike—in dealing with utility employers is more fiction than fact and has no proper place in the consideration of

this case. Instead, Laclede believes that this Court should consider the legal issues involved herein quite apart from the Appellants' thinly veiled implication that the State of Missouri and its public utilities have conspired to prevent utility unions from effectively representing their members.

Laclede believes that two important legal issues are involved in this case. The first is whether the case is moot, and the second is whether the seizure-no-strike provisions of the King-Thompson Act; §§ 295.180, 295.200 (1) and (6), R. S. Mo. 1959, are pre-empted by the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, ff., 29 U. S. C., § 141 et seq. Laclede believes that the case is moot and that it would be most inopportune for this Court to determine important issues affecting the health, safety and welfare of the people of an entire state in a case where no live issue exists between the parties. If this Court decides the case is not moot, and reaches the constitutional question, Laclede believes that it is clear that the seizure-no-strike provisions of the King-Thompson Act are not pre-empted by the Taft-Hartley Act because the state statute is narrowly drawn emergency legislation enacted under the state's inherent police power to protect the public from disaster.

ARGUMENT.

I. This Case Is Moot Because the Injunction Issued by the State Court Has Expired.

On December 28, 1962, the Governor of Missouri, acting pursuant to § 295.180, R. S. Mo. 1959, issued an Executive Order which vacated the state's seizure of the Kansas City transit company. This order, which is set out in the Appendix attached to the Appellee's brief, became effective on January 12, 1963, and was called to this Court's attention by the Appellee on January 8, 1963.¹ The Governor's order terminated the injunction issued against the Appellant because the Supreme Court of Missouri specifically held (361 S. W. 2d 33, 49, R. 183):

"... We find nothing in the Act to prevent appellants from making application to the Governor at any time for the release of the property of the utility upon reasonable notice and terms and **any such release would relieve appellants from the particular judgment entered in this case.** Further, as hereinafter mentioned, in the event of the denial of such relief, appellants could apply to the trial court for a modification of the judgment theretofore entered" (Emphasis supplied).

The termination of the seizure and the lower court's injunction makes this appeal moot, and any judgment rendered at the present time "would be wholly ineffectual

¹ Appellee's action in so doing was not only proper, but was in fulfillment of a duty imposed upon counsel practicing before this Court. As stated in Stern and Grossman, *Supreme Court Practice* (3d ed. 1962), p. 437, whenever any matter occurs which might render a pending case moot, "the Supreme Court regards it as the duty of counsel to call such facts to its attention, in order that it may not unknowingly exercise its authority in cases in which it no longer has jurisdiction."

for want of a subject matter on which it could operate." **Brownlow v. Schwartz**, 261 U. S. 216, 217. **Harris v. Battle**, 348 U. S. 803, and **Local No. 8-6, Oil, Chemical & Atomic Workers Union v. Missouri**, 361 U. S. 363, govern this case, and in unequivocal terms dispose of all of the arguments which are urged by Appellant in an attempt to persuade the Court that this appeal is viable (Br. 75-84). The relevant facts in this case are indistinguishable on any matter of substance from those in **Local No. 8-6**. Both involved utility strikes which had been enjoined under the King-Thompson Act and in both cases the state's seizure of the utility had been lifted before the case reached this Court. It is also clear that the injunctions issued in both cases expired before they reached this Court. In the instant case, the Missouri Supreme Court specifically held that the Governor's vacation of seizure terminated the injunction which had been issued against the Appellants under the King-Thompson Act, 361 S. W. 2d 33, 49 (R. 183). This constitutes a judicial construction of a state statute by the highest court of Missouri, and it is well settled that such a construction is binding on this Court. **West v. Louisiana**, 194 U. S. 258, 261; and **Missouri ex rel. Hurwitz v. North**, 271 U. S. 40, 41. Thus, there can be no dispute that the injunction enjoining the Appellants from striking has, like the injunction in **Local No. 8-6**, "long since expired by its own terms" (361 U. S. 363, 367).²

² The Appellants apparently concede, as they must, that the particular injunction issued against them by the Missouri courts has expired because the argument in their brief is primarily addressed to the proposition that there is nothing to prevent the Governor from instituting a new seizure (Br. 75-84). Despite this, Appellants point out in footnote 13 (Br. 75) that the trial court refused to sign an order dissolving the injunction. As shown in Appellants' brief, the trial court refused to do this on the ground that it could not enter any order while the case was pending in this Court, and not on the ground that the injunction is still in effect. The State of Missouri undoubtedly asked the trial court to

In *Amicus Curiae's* judgment it is quite unnecessary to go beyond the holdings in **Local No. 8-6**, and **Harris v. Battle** to show beyond all doubt that this case is moot. Nevertheless, the Appellants have attempted to "distinguish" these cases (Br. 75-84). *Amicus Curiae* believes Appellants should have candidly admitted that they are asking this Court to overrule **Local No. 8-6** and **Harris v. Battle** rather than trying to distinguish them. Since Appellants chose the latter course, however, it is appropriate to demonstrate that the suggested distinctions cannot withstand analysis.

Appellants argue that **Local No. 8-6** and **Harris v. Battle** are distinguishable because in those cases the labor dispute was settled before the cases reached this Court, whereas in this case the labor dispute has not been settled (Br. 77). In so doing, Appellants ignore the terms of the very judgment from which they are appealing. The judgment below enjoined the Appellants from striking while the utility was under state seizure (R. 128). The existence of a labor dispute between a utility and its employees is quite immaterial when the employees have been completely released from the imposition of the injunction from which they are appealing. This was settled in **Amalgamated Ass'n. of S. E. B. M. C. E. A. v. Wisconsin Emp. Rel. Bd.**, 340 U. S. 416, where this Court made it clear that the existence of an enforceable judgment rather than a labor dispute is the important criterion in determining whether a case of this type is moot. The Appellee argued that that case was moot because the labor dispute

enter the order of dissolution for the purpose of closing that court's file, and not because the State believed the trial judge's order was necessary (see letter from the Missouri Attorney General to Appellants' attorneys, which was filed in this Court on January 8, 1963). Regardless of the State's motive in requesting a dissolution order from the trial court, however, it is clear that the injunction has expired because, as pointed out in the text, Missouri Supreme Court so held.

had been settled, but the Court said, "no question of mootness can be raised so long as enforcement of that judgment is sought." 340 U. S. 416, 417. From this decision it follows *a fortiori* that when enforcement of the injunction ceases to be sought, the case is moot regardless of the status of the labor dispute. Appellants are not appealing from a judgment resolving a labor dispute, but from an injunction issued against them which has expired.

Appellants argue that the case is not moot because the State of Missouri is free to use the seizure-no-strike provision in the King-Thompson Act again, either in this labor dispute or in the next public utility strike which arises (Br. 76-80). Appellants base this argument on **Southern Pac. Terminal Co. v. Interstate Com. Comm'n**, 219 U. S. 498, and similar decisions which involved "short term" administrative orders that had expired before their validity could be finally adjudicated in the Federal courts (Br. 76, footnote 19).³ In those cases the Court held that an administrative agency which was the defendant in an action and which asserted continuing jurisdiction over the plaintiff, could not frustrate judicial review by issuing short term orders which expired before the appellate court could finally decide the case. It is not necessary to review the numerous distinctions between these cases and the instant case in detail, because in **Local No. 8-6** this Court held that the short term order cases did not apply

³ All of the cases cited by Appellants in footnote 19 (Br. 76) except *Application of Colton*, 291 F. 2d 487 (2d Cir.), are based on **Southern Pac. Terminal Co. v. Interstate Com. Comm'n**, 219 U. S. 498, which, along with cases akin to it, was expressly rejected in *Harris v. Battle*, 348 U. S. 803; and **Local No. 8-6, Oil, Chemical & Atomic Workers Union v. Missouri**, 361 U. S. 363, 368-369. *Application of Colton*, *supra*, relies solely upon *Yarnell v. Hillsborough Packing Co.*, 70 F. 2d 435 (5th Cir.), which, like the other cases cited by Appellant, is based on **Southern Pac. Terminal Co. v. Interstate Com. Comm'n**, *supra*. In short, all of the cases cited by Appellants in footnote 19 are mere echoes of **Southern Pac. Terminal Co.**

to an injunction issued under the King-Thompson Act (364 U. S. 363, 368-369):

"In this Court it was urged [in *Harris v. Battle*, 348 U. S. 803] that the controversy was not moot because of the continuing threat of state seizure in future labor disputes. It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act. It was contended that the situation was akin to cases like *Southern P. Terminal Co. v. Interstate Commerce Com.*, 219 US 498, 514-516, 55 L ed 310, 315, 316, 31 S Ct 279. In finding that the controversy was moot, the Court necessarily rejected all these contentions * * *. [T]he same contentions must be rejected in the present case."

Amicus Curiae has no quarrel with the holding in **Southern Pac. Terminal Co.**, and the other cases cited by Appellants in footnote 19 (Br. 76), but it is quite evident, as this Court held in **Local No. 8-6**, that they are not in point. Before an injunction can be obtained under the King-Thompson Act a full scale judicial proceeding must be instituted in a court of record where all parties have an opportunity to be heard. This is quite different from the type of quick, "ex parte" administrative order which the defendants were free to reinstate in cases like **Southern Pac. Terminal Co.**

There is another elementary reason why the cases cited by Appellants do not govern this case. Without exception the cases relied upon by Appellants involve a situation where a defendant by the cessation of allegedly illegal conduct, sought to prevent a plaintiff, the moving party, from obtaining relief by asserting that the cessation of such conduct rendered the matter moot. Thus, in **United**

States v. W. T. Grant Co., 345 U. S. 629, a defendant sought to prevent the government from questioning whether his position on the board of directors of several companies violated the anti-trust laws by resigning as a director of several of the companies and then asserting that the issue had become moot. Likewise, in **Southern Pac. Terminal Co.**, it was the defendant that urged the case was moot because it had abandoned the particular conduct which the plaintiff was trying to enjoin. This distinction was noted by this Court in **Mills v. Green**, 159 U. S. 651, and in **United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft**, 239 U. S. 466. In the latter decision the Court said (239 U. S. 466, 477):

"Leaving aside some immaterial differences, in terms the ruling in the Southern Pacific Case [219 U. S. 498], was based upon the decision in the Trans-Missouri Case [166 U. S. 290]. * * * The difference between this and the Trans-Missouri Case was clearly laid down in **Mills v. Green**, 159 U. S. 651, 40 L. Ed. 293, 16 Sup. Ct. Rep. 132, where, after announcing the general rule as to the absence of authority to consider a mere moot question, and referring to possible exceptions resulting from the fact that the want of actuality had arisen either from the consent of the parties or the action of a defendant, it was declared: 'But if the intervening event is owing to the plaintiff's own act * * * the court will stay its hand' " (Emphasis supplied).

Amicus Curiae have been unable to find any case wherein this Court has held that a plaintiff who voluntarily abandons his cause does not thereby preclude a judicial determination of the case. It must be remembered that the Appellee in this case was the moving party who, in the first instance, sought to enforce an alleged right against the Appellants.

Appellants' final and most vigorous argument on the mootness issue is that **Harris v. Battle** and **Local No. 8-6** are distinguishable because the seizure was vacated in this case merely to defeat this Court's jurisdiction and prevent an adverse determination of the constitutional issues (Br. 81-83). Appellants suggest that the Governor of Missouri is "an offender" who is using his position "to decide for himself when, if ever, he chooses to be brought to judgment" (Br. 83). Although a diatribe of this caliber hardly deserves recognition, *Amicus Curiae* feels compelled to demonstrate that there is no legal foundation for the Appellants' assertion. As this Court said in **Brownlow v. Schwartz**, 261 U. S. 216, 218, "The motive of the officer, so far as this question is concerned, is quite immaterial. We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate."

Commercial Cable Co. v. Burleson, 250 U. S. 360, in particular, shows that the Appellants attack on the Governor's motive has no legal merit. In that case the President seized the plaintiff's communication facility pursuant to emergency legislation enacted during the first world war. The plaintiff brought suit against the President's agent, the Postmaster General, to enjoin the seizure on the ground that the joint resolution under which the President acted was unconstitutional. After the case was taken under advisement by this Court the President lifted the seizure and returned the facility to the plaintiff. The plaintiff, like the Appellants herein, argued that the case was not moot because the President was free to institute the "illegal" seizure on another day. The Court held (l. c. 362):

"By appeals, the cases were brought here and were argued and submitted in March last. While they were under advisement the United States directed attention to the fact that, by authority of the President, all the

cable lines with which the two corporations were concerned and to which the bills related, had been turned over to and had been accepted by the corporations, and the government hence had no longer any interest in the controversy. As the result of submitting an inquiry to counsel as to whether the cases had become moot, that result is admitted by the United States, but in a measure is disputed by the appellants for the following reasons: First, it is said that as the taking over of the lines by the President was wholly unwarranted and without any public necessity whatever, there is ground to fear that they may again be wrongfully taken unless these cases now proceed to a decree condemning the original wrong; * * * (Emphasis supplied.)

* * * * *

"But we are of opinion that these anticipations of possible danger afford no basis for the suggestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot and must be dismissed for that reason. * * *

In short, Appellants' appeals for sympathy cannot change the fact that this case is moot. No better proof of this fact can be found than the concluding quotation which was selected by this Court in the **Local No. 8-6** case (361 U. S. 363, 371):

"* * * 'An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain.' * * *

II. The Seizure-No-Strike Provisions of the King-Thompson Act Are Not Pre-empted by the Taft-Hartley Act.

The primary constitutional issue on the merits of this case is the pre-emption question. If this Court abandons its prior decision in **Local No. 8-6, Oil, Chemical & Atomic Workers v. Missouri**, 361 U. S. 363, and reaches the constitutional issue, it should also carefully re-examine the pre-emption doctrine to be certain that it is not carried to unwarranted extremes. Amicus Curiae does not intend to explore the whole breadth of the pre-emption issue because it was covered with great care in the able opinion of the Court below (361 S. W. 2d 33, R. 158), and will be treated in detail in the Appellee's brief. Rather than inadequately rephrase the principal arguments, Amicus Curiae will present an analysis which may not be contained in the other briefs.

Before discussing the pre-emption issue, however, it is necessary to point out that the validity of the entire King-Thompson Act is not before this Court.⁴ The court below held that the seizure-no-strike provisions of the King-Thompson Act, §§ 295.180, 295.200 (1) and 295.200 (6) (361 S. W. 2d 33, 36-37, R. 158, 161), are the only portions of the Act which are involved in this case. The lower court also re-affirmed its prior decisions which held that the

⁴ Appellants evidently believe the entire Act is before the Court because its brief has gone to great lengths to demonstrate conflicts between the Taft-Hartley Act and the provisions in the King-Thompson Act relating to the State Mediation Board's powers and duties (Br. 41-48). A number of minor variations in the State Board's procedure and the procedure established by the federal act are singled out and given great emphasis (Br. 41-48). Although Laclede does not believe the mediation provisions in the King-Thompson Act are in conflict with the Taft-Hartley Act, it doesn't make any difference in this particular case if they are since the seizure-no-strike provisions are the only portions of the Act before the Court.

seizure-no-strike provisions are severable from the remainder of the Act which deals with the powers and duties of the State Mediation Board, 361 S. W. 2d 33, 46 (R. 158, 178-179); **State ex rel. State Board of Mediation v. Pigg**, 362 Mo. 798, 244 S. W. 2d 75, 83 et seq.; and **State v. Local No. 8-6, Oil, Chemical & Atomic Workers International**, 317 S. W. 2d 309, 315, 323 (Mo. Sup.).

In **Local No. 8-6, Oil, Chemical & Atomic Workers v. Missouri**, 361 U. S. 363, this Court recognized that the Missouri Court could limit its decision to the seizure-no-strike provisions of the King-Thompson Act (l. c. 366, 367):

“ * * * The Court restricted its consideration, however, to those sections of the King-Thompson Act, ‘directly involved’—‘Section 295.180, relating to the power of seizure, and sub-paragraphs (1) and (6) of Section 295.200, RSMo, V. A. M. S., making unlawful a strike or concerted refusal to work after seizure and giving the state courts power to enforce the provisions of the Act by injunction or other means.’ (Mo.) 317 SW 2d 309, at 316.”

Thus, it is clear that this Court should only consider the seizure-no-strike provisions, and that the opinion should be careful to avoid any general reference which might include the portion of the King-Thompson Act dealing with the State Mediation Board’s powers and duties.⁵

⁵ The A. F. L.-C. I. O.’s brief argues that the mediation provisions in the Act are before the Court because certain attempts at mediation were made by the State Board before the Governor seized the Kansas City transit company (A. F. L.-C. I. O. Br. 15-16). There might be some merit to this position if the Governor’s seizure had been predicated or dependent upon the preliminary mediation efforts of the State Board. This, however, is not the case because the Governor’s seizure was predicated solely upon the strike and the resulting threat to the “public interest, health and welfare” (R. 132-133, 134, 136-137). No attempt was made to justify the seizure on the Mediation Board’s failure to obtain a settlement of the labor dispute.

The seizure-no-strike provisions of the King-Thompson Act have on two occasions been authoritatively interpreted by Missouri's highest Court, see opinion below, 361 S. W. 2d 33, R. 158; and **State v. Local No. 8-6, Oil, Chemical & Atomic Workers International**, 317 S. W. 2d 309 (Mo. Sup.). In those cases the court held that the seizure-no-strike provisions are "strictly emergency legislation" enacted under the state's police power, 361 S. W. 2d 33, 49, R. 158, 184; 317 S. W. 2d 309, 321, which cannot be invoked in a labor dispute until the "public safety, health, and welfare is sufficiently endangered to require the State to be concerned with the operation of the utility and . . . (to take) . . . possession of its physical property . . . to prevent public disaster," 361 S. W. 2d 33, 53, R. 158, 191. Even in these circumstances an injunction cannot be obtained unless the courts find that an emergency actually exists. 361 S. W. 2d 33, 49, R. 158, 184; 317 S. W. 2d 309, 322. Finally, the lower court held that the King-Thompson Act does not authorize a permanent injunction in a particular strike, because the seizure and the injunction can only remain in effect while the emergency lasts, 361 S. W. 2d 33, 49, R. 158, 184.

This construction of the King-Thompson Act by the state court is, under established precedent, binding on this Court. **West v. Louisiana**, 194 U. S. 258, 261, and **Missouri ex rel. Hurwitz v. North**, 271 U. S. 40, 41. This Court's duty is to determine whether the statute as interpreted by the state court is constitutional.

Amicus Curiae feels that little can be added to the voluminous discussions about the effect of **Amalgamated Assoc. of S. E. R. M. C. E. A. v. Wisconsin**, 340 U. S. 383, which are contained in the other briefs. It is clear to Amicus Curiae that the **Amalgamated** decision does not control this case because the Wisconsin Act, unlike the King-Thompson Act, was not a police measure designed

for the sole purpose of protecting the public from disaster in an emergency created by a utility strike. Mr. Chief Justice Vinson was careful to point this out in the majority opinion when he said: "the Wisconsin Act before us is not 'emergency' legislation * * * and application of the act does not require the existence of an 'emergency,'" 340 U. S. 383, 393, 394. He even documented the latter statement by observing in footnote 19 that (l. c. 394):

"Far from being legislation aimed at 'emergencies' the Wisconsin Act has been invoked to avert a threatened strike of clerical workers of a utility * * *"

Thus, it is clear that the central question in this case differs radically from the question in the **Amalgamated** case. Regardless of the outcome of this case on the merits, Amicus Curiae believes that this Court should analyze the question presented by this Record and the lower court's construction of the King-Thompson Act, and refuse to dispose of the appeal by merely referring to the **Amalgamated** decision.

The other labor pre-emption cases like **Allen-Bradley Local v. Wisconsin Employment Relations Board**, 315 U. S. 740; **San Diego Bldg. Trades Council v. Garmon**, 359 U. S. 236; **Garner v. Teamsters C & H Local Union**, 346 U. S. 485; **Hill v. Florida**, 325 U. S. 538; **International Union of U. A. W. v. Wisconsin Emp. Rel. Bd.**, 336 U. S. 245; **Local 24, International Brotherhood of Teamsters v. Oliver**, 358 U. S. 283; **United Auto Workers v. Wisconsin Emp. Rel. Bd.**, 351 U. S. 266; **Weber v. Anheuser-Busch, Inc.**, 348 U. S. 468, and **Youngdahl v. Rainfair, Inc.**, 355 U. S. 131, have been discussed in the other briefs and there is little that Amicus Curiae can add. Generally speaking, these cases show that the Taft-Hartley Act does not pre-empt state police measures designed to protect public health, safety and welfare, although it does supersede general state

laws designed to regulate relations between management and labor. This generalization is illustrated by the violence cases where this Court has repeatedly held that the states' inherent power to protect the public and preserve order has not been impaired by the Taft-Hartley Act.

A great deal has been written in the other briefs concerning the intent of Congress with respect to utility strikes which create a local emergency. In documenting these arguments the briefs have set out a number of statements made by various Congressmen when the Taft-Hartley Act was passed. The various Holland amendments to the Taft-Hartley Act which have been introduced in Congress but never passed are also discussed in detail in the other briefs. The excellent discussions of this subject in the Amicus Curiae brief filed by the Kansas City Power and Light Company shows that there is nothing in the Congressional debates surrounding the Taft-Hartley Act or the defeat of the various Holland amendments which even remotely suggests that Congress intended to pre-empt the states' inherent police power to protect the public from disaster in a utility strike. In fact, as that brief shows, the Congressmen who participated in the debates obviously thought that the states could and should protect the public in genuine emergencies.

Rather than review the Congressional debates Laclau believes it could be more beneficial to examine another source of Congressional intent which has not been discussed in the other briefs. One of the basic sources for determining legislative intent is the language chosen by Congress in the federal act. **United States v. American Trucking Ass'n**, 310 U. S. 534, 543. This language is often overlooked in extended analyses of the Congressional Record, but it is nevertheless persuasive in many situations. The language used in § 7 of the Taft-Hartley Act, 29 U. S. C., § 157, conclusively demonstrates that Congress did not

intend to pre-empt narrowly drawn state legislation like the King-Thompson Act, which is aimed exclusively at preserving the public health, safety and welfare in an emergency created by a utility strike.

Language used in a statute should be given its usual and accepted meaning unless a contrary intent is evidenced by the legislature. In § 7 of the Taft-Hartley Act, Congress provided that "Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining . . .", 29 U. S. C., § 157. In selecting the word "right" Congress chose a word with many connotations, but there is one universally understood limitation attached to the word, and this is that a "right" which involves conduct is never absolute but "remains subject to regulation for the protection of society". **Cantwell v. Connecticut**, 310 U. S. 296, 304.

Thus, even the most basic "rights", such as freedom of speech, are subject to some limitation by the police power of the state in the interest of public health, safety and welfare, **Gitlow v. New York**, 268 U. S. 652; **Whitney v. California**, 274 U. S. 357. As Mr. Justice Holmes put it with characteristic clarity, no one has the right to shout fire in a crowded theater. **Schenck v. United States**, 249 U. S. 47, 52.

In **Jacobson v. Massachusetts**, 197 U. S. 11, this Court, while sustaining compulsory vaccination in the interest of the public health, said (l. c. 26):

"But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society

could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."

The foregoing cases show that the most basic individual "rights" are subject to the states' essential power to protect the public. These cases have nothing to do with the pre-emption doctrine as such, but they do illustrate the commonly understood limitations of the word "right" which Congress chose in § 7 of the Taft-Hartley Act. Since Congress must have been aware of these limitations, it is rather difficult to see how it can be argued that Congress by merely protecting the "right" to strike intended to create an absolute "right" which can be exercised even when it poses an immediate threat to the public's health, safety and welfare.

This Court has on various occasions recognized this principle by holding that the "right" to strike which is now protected by § 7 is not absolute. Thus in **Southern S. S. Co. v. National Labor Rel. Bd.**, 316 U. S. 31, it was held that there was no right to strike in violation of the federal mutiny law. In **International Union v. Wisconsin Emp. Rel. Bd.**, 336 U. S. 245, this Court said (l. c. 259):

"The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' and which, as the Court has pointed out, was recognized as such in its decisions

long before it was given protection by the Labor Relations Act."

Recognition by this Court that the Taft-Hartley Act does not bar the exercise of emergency state police powers to protect the public in a utility strike, though such exercise does in some instances restrict the right to strike, need not open the way to indiscriminate state encroachment upon the rights protected by the Taft-Hartley Act. Although it would not be proper in this brief to attempt a detailed exploration of the permissible limits on the states' exercise of their police power in areas protected by the Taft-Hartley Act, the cases dealing with basic individual "rights" show, by analogy, that there are very real limitations upon the exercise of the states' inherent police power to protect the public. Limitations applied in the same spirit in the labor pre-emption field would be an effective check on the states' ability through the use of their police power to interfere with the substantive "rights" protected by § 7. The most important limitation, of course, is whether the state law is a real police measure designed to protect health and safety, or whether it is a mere sham to hide a state regulatory measure, **The Hannibal & St. J. R. Co. v. Husen**, 95 U. S. 465. The sections of the King-Thompson Act here involved are clearly bona fide health and safety regulations because they are limited to public utilities which have monopolistic control over services essential to public health and safety and because the Governor must find that an emergency actually exists before the seizure-no-strike provisions can be invoked. Furthermore, the Governor's finding that an emergency exists is subject to judicial review.

Even if a state statute is a bona fide police regulation, however, it can not impose too broad or general a restraint on the exercise of basic individual "rights." By way of illustration, general licensing requirements which tend to

create a prior restraint on the exercise of a freedom protected by the Fourteenth and First Amendments are held to be invalid even though they are enacted under the states' police power, **Thomas v. Collins**, 323 U. S. 516 (free speech); **De Jonge v. Oregon**, 299 U. S. 353 (peaceful assembly); **Cantwell v. Connecticut**, 310 U. S. 296 (religion). The first of these cases used the following language to describe the only occasion upon which the police power would be justified in imposing a prior restraint on the exercise of these freedoms (323 U. S. 516, 530):

"These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, **must have clear support in public danger, actual or impending.** Only the gravest abuses, endangering paramount interest give occasion for permissible limitation." (Emphasis supplied.)

And (l. c. 540):

"... We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

These cases which illustrate the very limited occasion—immediate threat to the public health, safety or order—when the state is justified in imposing a prior restraint on the exercise of some of the basic individual freedoms are instructive of an important difference between the King-Thompson Act and the Wisconsin Act, which this Court struck down in **Amalgamated Ass'n of S. E. R. M. C. E. v. Wisconsin Emp. Rel. Bd.**, 340 U. S. 383. The Wisconsin statute imposed a prior and absolute restraint on all public utility strikes. On the other hand, the sections of the King-Thompson Act here involved do not

impose a prior or absolute restraint on the "right" to engage in a public utility strike, but instead only prohibit such a strike after the Governor and the courts have found that public health and welfare are in immediate jeopardy. §§ 295.180, 295.200 (1) (6), R. S. Mo. 1959, 361 S. W. 2d 33, 51, 52; R. 158, 188. An immediate threat to the public health and welfare is precisely the situation which justifies police interference with the basic individual rights discussed above. Compare **Thomas v. Collins**, 323 U. S. 516.

Further illustration of the potential limits on the states' power to interfere with "rights" protected by § 7 of the Taft-Hartley Act would be superfluous. These analogies demonstrate that there are potential limitations on this power, and that state laws which protect the public in an emergency can safely be allowed to restrict the exercise of a § 7 "right" without in any way jeopardizing the essence of the "right."

In attempting to determine the intent of Congress it is also important to remember that this Court has on numerous occasions held that a public health and safety measure is not pre-empted unless the Congressional intention to supersede such a regulation is absolutely clear. **Reid v. Colorado**, 187 U. S. 137, 148; **Mintz v. Baldwin**, 289 U. S. 346, 360; **Kelly v. Washington**, 302 U. S. 1, 13; **Savage v. Jones**, 225 U. S. 501, 532, and other cases collected in the dissent in **Hill v. Florida**, 325 U. S. 538, 549-552.

The case of **Maurer v. Hamilton**, 309 U. S. 598, where this Court held that the Motor Carrier Act of 1935 did not pre-empt a Pennsylvania statute which prohibited motor carriers from hauling cars on the top of their truck cabs because the practice was dangerous on the steep grades of the Pennsylvania highways illustrates this point. The Court based its decision on the well-established rule that a state safety regulation will not be pre-empted unless no

other interpretation of the federal statute is possible (309 U. S. 598, 614):

“As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. **This is especially the case when public safety and health are concerned.**” (Emphasis supplied.)

Since the King-Thompson Act is a police measure to protect public health, safety and welfare in an emergency, and since the Taft-Hartley Act does not show an unequivocal Congressional intent to replace such local laws, it follows that this case is governed by the usual rule against pre-emption in cases involving local police regulations. This rule has, in effect, been applied to the Taft-Hartley Act in the violence cases, where this Court has held that state laws or court action designed to protect the public by curbing violence are not pre-empted because there is no compelling Congressional direction to this effect. **Allen-Bradley Local v. Wisconsin Emp. Rel. Bd.**, 315 U. S. 740; **United Auto Workers v. Wisconsin Emp. Rel. Bd.**, 351 U. S. 266. The same result should be reached in this case by holding that state legislation designed solely to protect public health, safety and welfare in an emergency created by a utility strike is not pre-empted by the Taft-Hartley Act.

CONCLUSION.

For the foregoing reasons Amicus Curiae submits that this case should be dismissed because it has become moot.

If this Court decides that the case is not moot it should affirm the opinion of the Supreme Court of Missouri by holding that the seizure-no-strike provisions of the King-

Thompson Act are not pre-empted by the Labor Management Relations Act of 1947 as amended.

Respectfully submitted,

JAMES M. DOUGLAS,

W. STANLEY WALCH,

EDWIN D. AKERS, JR.,

705 Olive Street,

St. Louis 1, Missouri,

CEntral 1-0545,

Attorneys for Laclede Gas Company,

Amicus Curiae.

THOMPSON MITCHELL DOUGLAS &

NEILL,

Of Counsel.

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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 604.

**DIVISION 1287 of the AMALGAMATED ASSOCIATION
OF STREET, ELECTRIC RAILWAY and MOTOR COACH
EMPLOYEES of AMERICA et al.,
Appellants,**

vs.

**STATE OF MISSOURI,
Appellee.**

ON APPEAL FROM THE SUPREME COURT OF MISSOURI.

**BRIEF OF KANSAS CITY POWER & LIGHT
COMPANY, AMICUS CURIAE.**

**IRVIN FARR,
HARRY L. BROWNE,
HOWARD F. SACHS,
1000 Power & Light Building,
Kansas City, Missouri,
Attorneys for Amicus Curiae.**

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INTEREST OF AMICUS CURIAE.

This brief is filed by Kansas City Power & Light Company, *amicus curiae*, with the written consent of the parties, obtained and filed pursuant to Rule 42 of this Court.

The interest of Kansas City Power & Light Company in this case arises from the fact that it is a public utility operating in the State of Missouri and obligated by the Public Service Commission Act of said State (Chapter 386, RSMo 1959) to render continuous safe and adequate electrical service to the public in Kansas City, Missouri, and in other parts of the State. The Company operations are governed by the provisions of the act which is challenged in this proceeding (Chapter 295, RSMo 1959), commonly known as the King-Thompson Act, which was enacted to protect the people of Missouri from threatened interruptions in the service of public utilities.

In addition to its general interest in this legislation, arising from its duty to provide continuous service to the public, Kansas City Power & Light Company is interested as a party having had direct experience under the act. The Company was seized, pursuant to the provisions of the King-Thompson Act, in 1956 and again in 1957, when the Governor of Missouri determined that labor disputes between the Company and its employees threatened to interrupt the operations of the Company and to disrupt electrical service to the public.

ARGUMENT.

I. Appellate Review of the Validity of the Injunction Below Cannot Be Had, When the Case Has Become Moot by Expiration of the Injunction.

Once again, parties challenging the validity of the King-Thompson Act are insisting on review of a moot case. The point herewith presented is precisely the same as that which *amicus curiae* presented in prior litigation in this Court, and which served as the basis for decision. *Local*

8-6 Oil, Chemical & Atomic Workers Union v. Missouri,
361 U.S. 363.

The temporary restraint of State seizure (and an injunction persisting for the term of such seizure) has now been lifted; and appellants are free to strike against the transit company in Kansas City. As in the prior case, the Court is bound to declare (l.c. 371):

"The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms . . . Any judgment of ours at this late date 'would be wholly ineffectual for want of a subject-matter on which it could operate. An affirmation would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. . . ."

Equally applicable is the statement of the Court (l.c. 367):

"Because that injunction has long since 'expired by its own terms' we cannot escape the conclusion that there remain for this Court no 'actual matters in controversy essential to the decision of the particular case before it.'"

The present argument of appellants has been heard before, and rejected by this Court. It was not a new theme when the *Local 8-6* case was decided. As restated by the Court (l.c. 368):

"... it was urged (in prior litigation) that the controversy was not moot because of the continuing threat of state seizure in future labor disputes. It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act. . . . In finding that the con-

trovercy was moot, the Court necessarily rejected all these contentions."

Factual differences between *Local 8-6* and the instant case offer no basis for avoiding the result there reached. In the present case, there has been no contractual settlement, as occurred in *Local 8-6*, but the restraint imposed by law has terminated just as surely as in that case. In *Local 8-6*, the Court relied on the comment of the Supreme Court of Missouri to the effect that, when the Governor terminated seizure, the injunction "'expired by its own terms'" (l.c. 366). In the case at bar, the Supreme Court of Missouri anticipated the possible end of seizure, and declared, "any such release would relieve appellants from the particular judgment entered in this case." *State v. Division 1287, Amalgamated Association of Street, Electric Railway, and Motor Coach Employees of America*, 361 S.W.2d 33, 49. The State of Missouri has advised the Circuit Court of its view that, upon the release of the premises from seizure, there would be "no basis for restraint against the Union." (See letter of J. Gordon Siddens, Assistant Attorney General, to counsel and Circuit Judge Murphy, dated January 8, 1963, dispatched to the Clerk of this Court on said date.) Union officials have concurred in the view that no further action is needed to terminate the injunctive restraint. For example, see the lead article in *The Kansas City News-Press* of March 8, 1963, headed "Transit Tie Could Come 'Any Time'," a copy of which is reprinted as an appendix to this brief.

The mere fact that the restraint now under review ended three months rather than three years before submission of this case to the Court would not distinguish *Local 8-6* from the case at bar. Mootness occurring pending appeal, whenever noted, precludes decision on the merits of the former controversy. *Atherton Mills v. John-*

ston, 259 U.S. 13; *Bank of Iron Gate v. Brady*, 184 U.S. 665.

There is no substantial difference between the termination of a challenged restraint by reason of settlement of the economic dispute and by reason of executive decision that restraint is no longer authorized under Missouri law, as interpreted by the Missouri Supreme Court. Mootness is not a penalty imposed on a party because he has voluntarily acted in a manner which estops him from contending there is a controversy; it is simply the result of a determination that the controversy (in this case the restraint) has ceased. Factors beyond the control of a party can moot his case, as in the decisions above cited, where death and coming of age terminated appeals.

Nor is there authority for reclassifying a dead case because the appellee had a hand in its death. Appellants do not establish that the decision of the Missouri Supreme Court or the action of the Governor were made in bad faith. Appellants' suggestion that "nothing accounts for (the vacation of seizure) but the appeal" (Brief, page 23) conveniently forgets the Governor's duty to follow the direction set by the Missouri Supreme Court. The timing of the proclamation, three days after Christmas, was appropriate in its own right. It is unsound as well as ungenerous for appellants to suggest that this Court's docket was a factor in the Governor's decision. The controlling considerations appear to have been the public convenience and the opinion of the Missouri Supreme Court.

Even if one should disagree with the interpretation of the Missouri law expressed in the opinion below, an artificially restricted construction of such law would of course be proper to avoid constitutional issues. It would have mooted this appeal if the Missouri Supreme Court

had held that no transit strike in Kansas City can create an emergency such as will warrant State seizure, yet appellants would hardly be in a position to carry on their attack against this law. Under the actual decision of the Missouri Supreme Court, and the later action of the Governor, it may hereafter be difficult to convince Circuit Courts in the State that sufficient emergencies exist to justify seizures and injunctions in transit strikes. In fact, the Missouri Supreme Court's repeated references to "reasonable notice to the public" of a prospective transit strike as a test of emergency under the King-Thompson Act (361 S.W.2d 33, 50), renders doubtful the future practical applicability of the act to the transit industry. There is reasonable doubt that appellants will find the act successfully invoked in future transit strikes. Appellants' present interest in the validity of this legislation is moot, and their future interest is hypothetical and uncertain, in light of the decision of the Missouri Supreme Court.

Appellants assume they will be subjected to future restrictions, and make an emotional appeal based on past difficulties in obtaining this Court's ruling on the validity of the legislation in question. Note, however, that a comparable test of an injunction against a strike allegedly imperiling the "national safety" was processed from the filing of the complaint through the issuance of a decision by the United States Supreme Court in a total of eighteen days. *United Steelworkers of America v. United States*, 361 U.S. 39, 45. Moreover, if a test case based on an injunction were the only method of obtaining a determination of the validity of this legislation, and if such a test would likely become moot prior to the exhaustion of judicial proceedings, appellants can command no more sympathy than can those who would challenge other practices by governmental bodies, when there are no parties pos-

essed of a justiciable controversy to sustain litigation. For example, note the practices mentioned by Mr. Justice Douglas in *Engel v. Vitale*, 370 U.S. 421, 437, note 1, 439-442, many of which, if unconstitutional, are nevertheless beyond the reach of judicial power. It is respectfully submitted that the Court should adhere to its past decisions and resist temptation to use a moot case as a means for re-examining the delicate balance between State and Federal power, where labor relations and local responsibilities are inextricably intermingled.

II. The King-Thompson Seizure—Injunction Procedure Is a Valid Exercise of the State's Police Powers, Not Inconsistent with Federal Legislation.

In the following discussion, amicus reprints for the convenience of the Court, major portions of its amicus brief (pages 10-20) filed in the *Local 8-6* case, No. 42, October Term, 1959. Modification of the argument has been made to give the discussion current applicability.

A. The Amalgamated Decision Does Not Require a Pre-emption Ruling in This Case.

Appellants contend that this case is controlled by *Amalgamated Ass'n v. Wisconsin Employment Relations Board*, 340 U.S. 383, which invalidated the Public Utility Anti-Strike Law of Wisconsin, in litigation involving a perpetual injunction and fines imposed for contempt of court. The opinions of the Missouri Supreme Court provide a closely-reasoned answer to appellants' contention, and if elaboration is desirable, undoubtedly the State will supply it. Summarily, it may be stated that there is nothing in the federal legislation or in the decisions of this Court which would establish an unconditional right to strike, regardless of the consequences and circumstances.

and that recognized restrictions on the right, established by local law and consistent with federal law, could be applied by analogy to sustain the King-Thompson Act.

The majority opinion of Mr. Chief Justice Vinson in the *Amalgamated* decision, *supra*, clearly anticipated a distinction which is here urged, when he stated (l.c. 393-394), "the Wisconsin Act before us is not 'emergency' legislation . . . Far from being limited to 'local emergencies,' the act has been applied to dispute national in scope, and application of the act does not require the existence of an 'emergency.'" In footnote 19, the Chief Justice continued (l.c. 394), "Far from being legislation aimed at 'emergencies,' the Wisconsin Act has been invoked to avert a threatened strike of clerical workers of a utility (citation)."

The majority opinion was also careful to point out (l.c. 398-399) the inconsistency between the federal duty to continue collective bargaining and the state invocation of compulsory arbitration to resolve an "impasse." It would not be safe to assume, as appellants do, that these considerations, entering into the majority opinion in *Amalgamated*, and absent in the present case, were not decisive in the thinking of those who constituted the majority of the Court in 1951. It is entirely consistent to concur in the *Amalgamated* decision and to sustain the King-Thompson Act.

Powerful support has been given by subsequent decisions of this Court to an interpretation of the *Amalgamated* decision which would limit its application to instances which are clearly inconsistent with federal labor legislation, and which would permit legislation of the type enacted by the State of Missouri. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236. The decision itself merely held that a State court could not award dam-

ages for picketing which it could not enjoin. As noted in the concurring opinion, however (l.c. 250), the majority took the occasion to make a declaration of law which "will stand as a landmark in future 'pre-emption' cases in the labor field."

The majority opinion of Mr. Justice Frankfurter repeats prior declarations of the Court that (l.c. 240) "... the Labor-Management Relations Act 'leaves much to the states, though Congress had refrained from telling us how much ...'" The majority opinion further states (l.c. 243-244) "due regard for the presuppositions of our embracing federal system ... has required us not to find withdrawal from the states of power to regulate ... where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act." A similar thought is developed further in the *Garmon* opinion, where Mr. Justice Frankfurter states (l.c. 247), "... the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed Congressional direction."

The author of the *Garmon* opinion, whom we may now speak of as one of the great figures in the history of this Court, was very clearly recognizing local authority over both "violence" and other "imminent threats to the public order," (l.c. 247) such as are likely in an emergency situation arising during a strike in a public utility. This is apparent in Mr. Justice Frankfurter's use of reasoning almost identical to that in *Garmon* in his minority opinion dealing with the State of Wisconsin's Public Utility Anti-Strike Law, where he stated: "Due regard for the basic elements

in our federal system makes it appropriate that Congress be explicit if its desires to remove from the orbit of State regulation matters of such intimate concern to a locality as the continued maintenance of services on which the decent life of a modern community rests . . . I find no indication in the (federal) statute that the States are not equally free to protect the public interest in State emergencies." *Amalgamated Ass'n v. Wisconsin Employment Relations Board*, 340 U.S. 383, 403-404, 409. It would appear from *Garmon* that the majority of the Court is prepared to accept at least this much of the reasoning expressed by Mr. Justice Frankfurter in his dissent in the *Amalgamated* case. The *Garmon* decision is authority for the proposition that the States may exercise the police powers where there are "imminent threats to the public order" and "compelling state interest . . . in the maintenance of domestic peace." It is difficult to imagine stronger cases than those covered by the King-Thompson Act, where situations are dealt with which are "deeply rooted in local feeling and responsibility," and which therefore resist application of a doctrine resulting in local disability.

It may perhaps be argued from the ruling in *Garmon* that the Labor Board should have primary jurisdiction to determine whether strikes in public utilities create local emergencies and, if so, whether they are nevertheless protected by the federal law. This would, however, be a perversion of the *Garmon* decision, where, as in an economic strike against a public utility, there is no arguable basis for filing an unfair labor practice charge, and thus no statutory method of reaching the Board for decision. It would be patently unsound to concede on the one hand that Congress left the States free to deal with local emergencies, but to hold on the other hand that the determination of whether or not there was such an

emergency must be withheld in deference to the expertise of the Labor Board, when Congress has failed to provide a statutory method by which that expertise could be exercised.

It thus appears, from the most recent "landmark" decision of this Court, as well as from the reasons developed prior thereto, that the *Amalgamated* decision is not so far-reaching as to require the invalidation of the King-Thompson Act, and that the act is a proper exercise of the State's police powers, and is not affected by federal legislation.

B. Legislative History Favors Validity of the King-Thompson Act.

Appellants argue that Congress has "ratified" the "rule" in the *Amalgamated* decision (Brief for Appellants, pages 60-68) and "has left no room for the King-Thompson Act." They rely on (1) Senate rejection of the Holland amendment, which would have given express authority to the States to regulate, qualify or prohibit strikes by employees of public utilities and (2) the adoption of an amendment to the Taft-Hartley Act which dealt with federal-state jurisdiction and ceded complete jurisdiction to the States in certain instances but which did not treat the issue here, where there is concurrent jurisdiction over the industry involved.

The amendment to Taft-Hartley was contained in Section 701 (a), Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257. The adoption by Congress of this amendment in which, in the words of Senator Carroll (105 Cong. Rec. 16416) "for the first time—we begin to soften the so-called doctrine of pre-emption," cannot reasonably be the occasion for claiming that all pre-emption decisions not touched by Congress were automatically

reaffirmed, and all pre-emption questions not treated were ruled in favor of federal control.

With respect to the Holland amendment, a reading of appellants' argument on this point would lead to the impression that an overwhelming majority of Senators have indicated their preference for letting the collective bargaining process in public utilities develop into "a brute contest of economic power," even though this may be accompanied by widespread public inconvenience and suffering, rather than allowing local authorities to adopt regulatory measures to avoid a local emergency. Examination of the Congressional debates shows, on the contrary, that not a single Senator took such a position.

It is true that various proposals have been made (principally by Senator Holland of Florida) for "clarification" of the right of local authorities to deal with local emergencies which frequently accompany strikes in public utilities, and it is also true that legislation providing such clarification has not been enacted by Congress. Appellants indicate that legislative proposals on this subject have been defeated on roll-call votes in the Senate on three occasions, in 1954, 1958 and 1959. In 1954, the proposal affecting public utilities was part of a general proposed revision of the Taft-Hartley Act, and was not voted on separately. The decisive bloc of votes was cast by twenty Southern Senators, who defeated the amendments. Senator Holland explained his regret that he must vote against the proposals, because they were open to "Fair Employment" amendments. 100 Cong. Rec. 6202. Omitting consideration of the Southern votes, the amendments commanded support from a plurality of the Senators. The 1954 vote cannot fairly be considered as a rejection of local control over local emergencies caused by labor-management strife.

Nor can the 1958 and 1959 defeats of the Holland amendment be used to show Congressional intent to close this field to local regulation. A reading of the debates on June 13, 1958, and April 25, 1959 (104 Cong. Rec. 11090-11101, 105 Cong. Rec. 6733-6740), discloses that most of the participating Senators who voted against the amendment favored it in principle. The only Senator indicating definite opposition to the proposal in 1958 was Senator Morse. He stated opposition to the proposal "in its present form * * * I have deep convictions about compulsory arbitration and the dangers it will lead to in the country. I think there are alternative procedures for handling public utility strikes that are preferable to those which the Senator from Florida has offered." (l.c. 11097). Thus, the emergency-seizure technique used in Missouri was not the special target of Senator Morse's opposition, and not one of the Senators may be counted as an advocate of "letting the strike take its course," which appellants say is the result of the present law.

The position of Senator John F. Kennedy, as expressed in 1959, is of particular interest. The then-Senator from Massachusetts "reluctantly" opposed the Holland amendment (105 Cong. Rec. 6740). Searching his words on that occasion shows that he favored treating the problem in a separate bill, raised the question of compulsory arbitration, favored the retention of the right to strike when there is no true emergency, and indicated there was no urgent need for legislation because (in true emergency or public jeopardy situations) "the courts have the power to act in cases in which the health, safety and basic welfare of the citizens of the State are at stake. The courts have been given by the States the power to seize industries to protect the public health and safety." (l.c. 6740).

Senator Kennedy apparently had in mind, and assumed the partial or complete validity of, the statute of his native State, which has seizure provisions, but is restricted to prevention of a dangerous curtailment in the supply of essential goods and services, such as gas and electric light and power. Chapter 150B, Section 1-8, Ann. Laws of Mass., enacted in 1947 and amended in 1954. The Massachusetts statute is one of those threatened by this litigation (Appellants' Brief, page 50, note 9).

If Senator Kennedy was right, the principle of King-Thompson is sound, and safe from claims like appellants', that Federal law pre-empts the field. Of significance in this case, however, is Senator Kennedy's caveat relating to emergencies. He stated that a transit strike "is an inconvenience; but every strike involves inconvenience" (l.c. 6740). Thus, the main danger of pre-emption in this case arises from invoking the law in order to protect the public from the widespread inconvenience of a transit strike.

On the broad issue presented by appellants, however, the validity of State restrictions on strikes by public utility employees which create local emergencies, it appears that Congress has not "ratified" a supposed rule prohibiting such restrictions, but on the contrary not a single participant in Congressional debate defended the "public be damned" attitude which appellants would read into the failure of the Holland amendment.

C. The Amalgamated Decision Should Be Overturned If It Necessarily Invalidates the King-Thompson Act.

Argument has heretofore been made that appellants are urging a wholly unwarranted extension of the Amalgamated decision, which would cripple local authorities in the exercise of the police power, in a manner which is not

required by federal legislation and would in fact upset the division of state-federal responsibility in the labor field. If, however, there are members of the Court who have difficulty squaring the King-Thompson Act, as applied in this case, with the *Amalgamated* decision, then it is respectfully urged that the principles announced in the *Amalgamated* decision should be reconsidered and overturned in the light of further experience and additional guides to Congressional intent.

In the *Amalgamated* decision, and particularly in footnote 21, the majority of the Court inferred that the sponsors of the Taft-Hartley Act, notably Senator Taft, were seeking to assure a federally-protected right to strike in public utilities, and were not merely by-passing this question as a matter of federal law, thus leaving the States free to regulate labor disputes of essentially local concern, consistently with the federal scheme. The dissenting opinion in *Amalgamated* refused to accept this interpretation of Senator Taft's comments (l.c. 403-404), and it can now be determined that the minority opinion correctly viewed the legislative intent of Taft-Hartley's sponsors.

Professor Paul R. Hays of Columbia University, in an article entitled "Federalism and Labor Relations in the United States," 102 Univ. of Pa. L. Rev. 959 (1954), concluded that the legislative history of the Wagner and Taft-Hartley Acts might be summarized as follows (l.c. 965-966):

"If congressional 'intent' concerning state regulation of labor relations may be derived not only from the express comments on particular aspects of the problem but also from the attitude of Congressmen in general, then the legislative history of the two acts taken as a whole and the comments of the senators at the 1953 hearing on proposed amendments support the contention that Congress intended to supplement state regulations rather than to displace it. For example,

Mr. Hartley said (in 1947), in answer to a question about the effect of the federal act on Wisconsin Law: "... this will not interfere with the State of Wisconsin in the administration of its own laws." (citation). Senator Taft said (in 1953): "I may say that we never intended any pre-emption of the field. The Supreme Court has gone beyond what we intend." (citation). "In general, I am quite willing to leave to the states the control of anything that we can do." (citation). "Of course, I do not offhand see why the states cannot handle a local public utilities strike, a street car strike, or anything else, as well, as the Federal Government." (citation)."

Professor Hays continued (l.c. 968):

"The Court has held that, where the Congress chose to regulate strikes which create a national emergency, its rejection of proposed legislation which would have regulated local emergencies as well indicates an intention that local emergencies should be 'unregulated.' (citation of *Amalgamated* case). It seems much more likely that Congress 'intended' to leave such regulation to the states."

Likewise, Professor Bernard D. Meltzer of The University of Chicago, in an article entitled "The Supreme Court, Congress and State Jurisdiction Over Labor Relations," Special Supplement, The University of Chicago Law School Record (1958), 95, suggested (l.c. 98) that in the *Amalgamated* decision "an abstract formula became controlling despite the fact that such a formula could not be supported in terms of either a plainly expressed legislative purpose or the consequences produced in concrete situations." Professor Meltzer compared "the Court's sanction of state power over 'violence' on the picket line" with its apparent "denial of state power to maintain the flow of essential services," and commented (l.c. 98):

"Plainly, a breakdown in such services could enormously increase and complicate the problem of preserving order. Furthermore, such a breakdown posed at least as serious a problem for local authorities as a breach in the etiquette of picketing."

Finally, in the debates on the Holland amendment, Senator Holland reported (104 Cong. Rec. 9984), that Senator Taft "made no secret of his complete disagreement with the majority opinion" in the *Amalgamated* case, which relied heavily upon the supposed support of the principal sponsor of the Taft-Hartley Act.

It is submitted that adherence to the doctrine of *stare decisis* would require a finding that the issues which appellants seek to litigate in this appeal have become moot. If, however, the Court should find occasion to reach the merits of this case, contrary to its practice heretofore discussed, and if the Court should also conclude that the current validity of the *Amalgamated* principle is decisive, it is respectfully submitted that the Court should then depart from precedent on the substantive, as the procedural, question, and should abandon the *Amalgamated* decision, in the light of experience and additional guides to legislative intent.

III. Any Reversal of the Judgment Below Should Be Cautiously Stated, So As Not to Endanger Application of the King-Thompson Act to Basic Public Utilities, Whose Breakdown of Service Would Create Undisputed Local Emergencies and Disaster Situations.

Three members of this Court, in *Local 8-6*, dissented from the finding of mootness and expressed the view that the decision of the Missouri Supreme Court should be reversed "on the merits" (361 U.S. 363, 372). While amicus

believes that the dissenting members of the Court may now accept the Court's conclusion that cases such as this are moot, once the restraint on employees has been rendered inoperative, it recognizes that if the merits should be reached, there remains a possibility of a reversal. Such a result, though quite unsound in the opinion of amicus, would not create grave problems for local communities and for basic public utilities (those treated in the Massachusetts statute) if the Court should follow the well-established practice "not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record." *Garner v. State of Louisiana*, 368 U.S. 157, 163.

This case is an appeal from an injunction saving the community of Kansas City from widespread public inconvenience and jeopardy occasioned by a transit strike. Whether the imminent threat of such widespread work stoppage poses a local emergency is arguable. The Governor of Missouri, basing his judgment on the opinion of the Missouri Supreme Court and his information regarding local conditions in Kansas City, terminated seizure and gave appellants the opportunity to strike. The Mayor and City Counselor of Kansas City thereafter sought to require a new seizure of the industry, on the theory that a transit strike would create an emergency under mid-winter weather conditions existing at the time seizure ended. There has, however, been no resumption of State operation of the transit system.

As has been noted, Senator Holland and Senator John F. Kennedy disagreed over whether an "emergency" had been created by a lengthy transit strike in Florida. Senator Kennedy treated such strikes as merely matters of "inconvenience." 105 Cong. Rec. 6740. If this Court should conclude that a transit strike does not create a true emer-

gency for local officials, then the public interest in labor relations in the local transit system would perhaps not qualify as an interest "deeply rooted in local feeling and responsibility," which is the test for avoidance of pre-emption, as stated in *Garmon, supra*.

In reaching the merits of this case, there should properly be a withholding of any observations extending beyond the general subject of transit strikes, and thereby the Court would avoid unnecessarily judging cases in public utility industries not now before the Court. (Certainly the Court would not wish to volunteer statements which would invite a disastrous collapse of gas or electric services in Kansas City or St. Louis, resulting from an unresolved labor-management dispute.) Since there is no reason to go beyond the record in this case, and to comment unnecessarily on the validity of the King-Thompson Act, in its application to basic public utilities in Missouri, and since such comment would be contrary to the established practice of this Court, as recently expressed in *Garner, supra*, amicus respectfully submits that the wise practice so stated should be followed in this case.

Apart from the pre-emption issue, appellants rely on the "right to strike," which they assert under the Thirteenth and Fourteenth Amendments. Even here, a distinction is possible between industries. A completely effective transit strike, closing down public conveyances, is conceivable and not infrequent in this country, while local toleration of an extensive breakdown in the services of basic public utilities is nearly inconceivable. Where the full exercise of an asserted "right" is nearly inconceivable, its constitutional sanctity can hardly be seriously urged.

Assuming, however, that the "right to strike" argument has some bearing on the validity of the seizure and

injunction provisions of the act, as applied to the business of amicus, brief response may be appropriate. Appellants assert that utility employees in Missouri are "crippled" by the act and cannot obtain "satisfactory terms" from their employers, who are in a position to "dictate" the terms and conditions of employment (Brief, page 70); and appellants advise the Court that "economic servility" results (Brief, pages 72, 74). These strong words are unsupported by statistics showing the supposed substandard conditions of utility workers in Missouri, arising during the decade and a half in which they have been "enslaved" by this legislation.

In making their argument, appellants ignore significant economic factors such as the profitableness to the employer of a strike in gas and electric companies, when all wages cease yet a breakdown of service is avoided, and they forget the ability of utility companies to pass on wage increases to the ultimate consumers, through rate increases obtained from regulatory agencies. The legislature might conclude that protection of consumer interests requires legislation of this type, so that management will not yield too easily to inflationary demands, backed by the threat of economic coercion.

As a concluding argument, amicus submits that a broadly phrased decision, declaring the invalidity of all seizure-injunction laws throughout the country, whether in the transit industry or in more basic public utilities, would do violence to important considerations which have long prevailed in this Court. Such a result would contravene the classic statement of Mr. Justice Brandeis in his dissent in *New State Ice Co. v. Liebman*, 285 U.S. 262, 311:

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right

to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

Today and in this case the threatened "closing of the laboratories" comes, not from the forging of private political and economic views into constitutional principles, under the auspices of the Fourteenth Amendment, but from the suggested use of the Supremacy Clause to work an unintended result from the efforts to amend the Wagner Act in 1947.

Those efforts culminated in a statute which is probably the major legislative accomplishment of the Eightieth Congress and of Senator Robert A. Taft. Giving that statute a judicial application whereby its greatest practical consequence is in disabling the States in labor relations, even when the local interest far exceeds that involved in the "etiquette of picketing," would seem to be less an exercise in statutory construction than a dramatic illustration of the theme that man's best laid plans "gang aft agley."

The expansion of pre-emption's "no man's land" so as to encompass public utilities essential to community life would perhaps jolt Congress into taking action—but it is submitted that pre-emption need not be converted from a difficult doctrine into a monstrosity, and the forcing of Congressional hands would not necessarily result in legis-

lation superior in quality to that which has been devised in Missouri, Massachusetts or Virginia.

CONCLUSION.

Amicus curiae respectfully submits that this cause is and should be declared moot. If the Court should reach the merits, however, it is respectfully submitted that the judgment below should be affirmed. In the event, however, that a majority of the Court should determine that the judgment below should be reversed on the merits, it is respectfully submitted that the opinion and ruling of the Court should be expressly confined to the precise facts presented in the record, which relate to an injunction against striking in the public transit industry.

Respectfully submitted,

.....
IRVIN FANE,

.....
HARRY L. BROWNE,

.....
HOWARD F. SACHS,

Attorneys for Amicus Curiae.

April, 1963.

APPENDIX.

Article appearing in *The Kansas City News-Press*, March 8, 1963.

Transit Tie Could Come "Any Time"

Union Official Says Strike Call May Be Nearing Loren Hargus Says Negotiations Are Still Stalemated

Loren Hargus, head of the transit workers union here, told *The News-Press* this week that a strike against Kansas City Transit, Inc., hanging fire for many weeks, could come at any time.

Hargus and other officials of the Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America met Monday before a federal mediator with officials of the transit company. Hargus said that no progress was made and the meeting was adjourned subject to the mediator's call.

"We have not been able to get the company to get serious about trying to negotiate a settlement," Hargus said. "I don't know how long we'll be able to extend our patience."

Hargus said that the union's executive board is authorized to call the city's bus drivers out on strike and indicated that the time may be drawing near for the board to act.

The union official said that his organization was interested in several pending court actions relative to the labor dispute. ONE, he said, would allow the transit company to "sell out." This is opposed not only by his union but the city, Hargus said.

Hargus termed this an attempt by the company to "get out from under—get out of town."

A sudden strike by the transit workers would leave the city without any facilities for mass public transportation.

U.S. Supreme Court, U.S.
FILED

APR 6 1963

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 604

DIVISION 1287 OF THE AMALGAMATED ASSOCIA-
TION OF STREET, ELECTRIC RAILWAY
AND MOTOR COACH EMPLOYEES
OF AMERICA ET AL., *Appellants,*

vs.

STATE OF MISSOURI, *Appellee.*

On Appeal from the Supreme Court of Missouri

BRIEF FOR APPELLEE

THOMAS F. EAGLETON,
Attorney General of Missouri,
J. GORDON SIDDENS,
Assistant Attorney General of Missouri,
JOSEPH NESSENFELD,
Assistant Attorney General of Missouri,
JOHN C. BAUMANN,
Assistant Attorney General of Missouri,
Supreme Court Building,
Jefferson City, Missouri.
Attorneys for Appellee.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1962.

No. 604

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA ET AL., Appellants,

vs.

STATE OF MISSOURI, Appellee.

On Appeal from the Supreme Court of Missouri

BRIEF FOR APPELLEE

OPINION BELOW

The opinion of the Supreme Court of Missouri is reported at 361 S.W.2d 33.

JURISDICTION

The Missouri Supreme Court entered its judgment October 8, 1962, affirming, as modified, an injunction issued

by the Circuit Court of Jackson County, Missouri, enjoining a strike against the State of Missouri during State possession and operation of a utility (R. 198). Although this judgment was not then final under Missouri procedure, notice of appeal was filed on October 8, 1962 (R. 199). The Jurisdictional Statement was filed in this Court on November 20, 1962, and probable jurisdiction was noted on January 14, 1963 (R. 202). Appellants rely on 28 U.S.C., §1257(2), as conferring jurisdiction on this Court to review by appeal the judgment of the Missouri Supreme Court.

By his Executive Order, effective 11:59 P.M., January 12, 1963, the Governor of Missouri terminated State possession and operation of the utility. Under the King-Thompson Act, as construed by the Missouri Supreme Court, this release had the effect of relieving appellants of all restraints imposed against them by the judgment (R. 183). There is no longer an actual case or controversy on the merits with respect to which the judgment of this Court could be effective. The controversy having become academic and the case moot, for want of a subject matter, this Court does not have jurisdiction of the merits of the appeal.

STATUTES INVOLVED

Sections 295.180, 295.200(1), 295.200(2), 295.210, and 295.010 of Chapter 295, Revised Statutes of Missouri, 1959 (King-Thompson Act), set out in Appendix A to Appellants' Brief; Labor-Management Relations Act, 1947, 29 U.S.C. § 141 *et seq.*, set out in Appendix B to Appellants' Brief.

QUESTIONS PRESENTED

1. Does the National Labor-Management Relations Act deny to the State of Missouri the right to enact, under its reserved police power, those sections of the King-Thompson Act, severable from the remainder of the Act, which (1) authorize the State, upon a finding by the Governor, judicially reviewable, that a strike or threat of strike by utility employees has in fact created an emergency threatening the public health, safety and welfare with impending disaster, to take possession of the physical property of the utility for use and operation by the State in the public interest during the period of the temporary emergency and (2) sustain an injunction against a strike or concerted refusal to work for and under the supervision of the State during the period of State possession, control and operation?

2. Do said sections of the King-Thompson Act, as construed by the Court below, deny utility employees due process in violation of the Fourteenth Amendment of the United States Constitution, or impose involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution by requiring the postponement of the exercise of the right to strike until the end of the temporary emergency which threatens the public health, safety and welfare with impending disaster, and during which period the State is in possession of the property of the utility for use and operation by the State in the public interest, but which sections do not require State possession and operation until the settlement of the labor dispute, nor otherwise prohibit strikes or other concerted actions by utility employees?

STATEMENT

An impasse having been reached in collective bargaining negotiations between appellants Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America (herein called the Union) and Kansas City Transit, Inc. (herein called the Company) (R. 163, 68), members of the Union voted to strike against the Company (R. 71), effective at midnight, November 13, 1961 (R. 163, 72). Thereafter, after investigation, the Governor of Missouri issued a proclamation on November 13, 1961, that the public interest, health and welfare were jeopardized by the threatened interruption of the operation of the utility by the threat of a strike, and that it was necessary that he exercise the authority vested in him by statute to insure the operation in Missouri of the utility (R. 132-133). On the same date, the Governor issued his executive orders taking possession of the plants, equipment and all facilities of the Company in Missouri for the use and operation by the State of Missouri in the public interest, effective at 11:59 P.M., November 13, 1961 (R. 134-137). The Union, by concerted action, refused to operate the transportation facilities after the physical properties of the Company were in the possession and under the control of the State of Missouri (R. 5, 131, 167), and the strike previously called went into effect (R. 72, 167) despite State possession, control and operation until service of a temporary restraining order in this suit (R. 72). The petition for an injunction was filed by the State of Missouri on November 15, 1962 (R. 167), in the Circuit Court of Jackson County against the Union, its officers and members, appellants here (R. 1-6). The Company was not a party to the action (R. 159, 175). After a hearing, the Circuit Court issued the injunction appealed from on

February 12, 1962, restraining appellants from "continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri." (R. 128). On appeal from the injunction decree, the Missouri Supreme Court, on October 8, 1962, modified the judgment so that the trial court would retain jurisdiction of the cause with the right to modify the decree in accordance with changing facts and conditions (R. 184), and, as modified, the judgment was affirmed (R. 198).

Thereafter, on December 28, 1962, the Governor of Missouri, after investigation, found that although the labor dispute had not been settled, State possession and operation of the utility was no longer necessary to protect the citizens of the State from disaster, terminated State seizure and ordered that all direction and control of the utility's property be relinquished to the Company effective January 12, 1963 (Appendix, Appellee's brief). The State's possession and operation of the utility ended as of 11:59 P.M., January 12, 1963.

SUMMARY OF ARGUMENT

I.

The case is moot. The judgment appealed from enjoined appellants from striking against the State of Missouri after the Governor took possession of the physical property of the Transit Company for the use and operation by the State of Missouri in the public interest. Under the King-Thompson Act, as construed by the Court below, State possession and operation of the property of a utility is not authorized except upon a finding by the Governor, reviewable by the courts, that an emergency exists which threatens the public health, safety and welfare with imminent jeopardy and disaster.

Although State possession must, in any case, terminate as soon as practicable after settlement of the labor dispute, such possession and operation by the State may not validly continue after it is no longer necessary to protect the citizens of the State from disaster, even though the labor dispute remains unresolved. A permanent emergency is not envisaged by the Act and a permanent injunction against a strike is not authorized. Both the seizure and the injunction in aid thereof relate to a purely temporary emergency situation.

On December 28, 1962, the Governor, after investigation, found as a fact that a strike or the threat of a strike would no longer threaten the citizens of the State with disaster or jeopardize the public interest. Under the Act, as construed by the Court below, it became and was the mandatory duty of the Governor to vacate State possession, control and operation, and for such reason the Governor released control of the utility's property effective 11:59 p.m., January 12, 1963. Such release automatically relieved appellants of the injunction appealed from.

The injunction from which the appeal was taken expired by its own terms with the release of the property, and there is no subject matter presently in existence upon which a judgment of this Court can operate. *Local No. 8-6 v. Missouri*, 361 U.S. 363; *Harris v. Battle*, 348 U.S. 803. There is presently no controversy between the parties except the academic dispute relating to the validity of certain sections of the King-Thompson Act on the authority of which the State, through its Governor, initially acted to seize the Transit Company's properties and obtain the injunction.

The State could not legally retain possession and control of the Transit properties for the sole purpose of avoiding mootness. The Governor could not properly permit

the extraneous circumstance of the pendency of an appeal to affect his duty under the law to release the property inasmuch as the requisite jeopardy to the public interest when the strike or threat of strike had ceased to exist. There is not the slightest basis of fact for appellants' assertion that a renewed strike would ultimately result in renewed seizure, and such argument is contrary to the Governor's finding.

II.

The Court below held that those sections of the King-Thompson Act which authorize the seizure of the property of a utility for use and operation by the State in the public interest are severable from all other parts of the Act. This case does not involve the validity of any of the remaining parts of the Act, including those relating to the State Board of Mediation, and compulsory hearing, fact-finding or recommendation procedures applicable to labor disputes in privately owned utilities. The Court below held that those sections of the Act which authorize the State to take possession of the property of a utility for State operation in an emergency which seriously jeopardizes the health, welfare and safety of the public and bars a strike against the State which would interfere with State operation during such temporary emergency are valid independently of the remainder of the Act, and that it was unnecessary to determine the validity of any other sections to sustain the grant of injunctive relief. The construction of the severability of the sections of the State law immediately involved in this case, is conclusive on this Court. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572; *Allen Bradley Local v. Wisconsin Board*, 315 U.S. 740. Appellants on appeal to this Court attempt to draw in question the remaining parts of the King-Thompson Act, but no such issue was decided below nor was necessary for the determination of the propriety of injunctive relief.

III.

The King-Thompson Act, enacted under the police power of the State, authorizes State seizure and operation of the property of a utility for the protection of the public against disaster during a temporary emergency period. The property of the utility may not be seized as a matter of course merely because a strike is threatened or has been called by its employees, and it has not been so construed either judicially or administratively. Nor does the mere existence of an emergency of itself authorize State seizure and operation of a utility. The emergency must be one which truly jeopardizes the public interest, safety and welfare to a degree sufficient to create a threat of imminent public disaster. Those sections of the Act involved on this appeal are premised upon the basic sovereign right of self-preservation of the State and are not intended to regulate, and do not have the effect of regulating, labor-management relations.

Collective bargaining between the utility and its employees is not interfered with at all by the Act. Nor is the right of utility employees to strike affected, except that during the temporary period the State is in possession and control of the property of the utility, the employees may not, by concerted action, interfere with operation by the State necessary to prevent public disaster. Any strike during the temporary period of State possession and operation is truly a strike against the State and not against the utility, and such a strike is not a protected activity under the National Act. The State may not retain possession and control after the threat of disaster no longer exists, even though the labor dispute itself has not been settled. The strike weapon remains for use by the employees, but when timed to be inimicable to the public interest, its use is temporarily postponed during the brief

period public welfare is immediately threatened and in substantial jeopardy.

The Act is not in conflict with or pre-empted by the National Act. Congress has not manifested an intent to exclude the exercise of State police power to protect the citizens of the State during a temporary emergency period when disaster threatens. The National Act contains no clear positive mandate guaranteeing an absolute right to strike at any time and under all circumstances without regard to the disastrous effect of the timing of a particular strike upon the public health, safety and welfare, and when such strike is in actuality against the State itself. Sections 1(b) and 13 of the National Act indicate the congressional purpose to permit the exercise of emergency State police power to protect the public, rather than leave the State completely helpless and impotent. The Act, having been enacted in pursuance of the State's dominant local concern in the protection of the public health, safety and welfare, and being applicable only in a temporary emergency situation which results in actual or imminent jeopardy to the public, is not in conflict with either the policy or purpose of the National Act.

The Wisconsin statute involved in the *Amalgamated Association* case is wholly unlike the *King-Thompson Act*. The Wisconsin statute substituted arbitration upon order of the State Board for collective bargaining whenever an impasse was reached in the bargaining process, and to insure conformity with the statutory scheme Wisconsin denied entirely the right of utility employees to strike at any time. The Wisconsin law was a comprehensive code for the settlement of labor disputes in utilities and rendered true collective bargaining completely ineffective. The Wisconsin law was not emergency legislation and its application did not require the existence of an emergency

jeopardizing vital public interests. Wisconsin prohibited the right to strike irrespective of the existence of an emergency involving jeopardy to the public and was truly a regulation of labor-management relations. The Missouri Act does not embody compulsory arbitration at all nor interfere with the right of free collective bargaining. As construed by the Court below, it is applicable only if an emergency in fact exists sufficiently grave to imperil the public welfare. Such finding is subject to judicial review. The right of utility employees to strike is recognized, and the mere exercise of such right does not, of itself, call for State seizure and operation of a utility. State seizure and operation in the public interest is authorized only upon a finding by the Governor that an emergency exists which, in fact, jeopardizes the public interest and threaten the State with imminent disaster. And it is only during the existence of such temporary emergency and while the State is in possession and control of the utility that a strike or concerted action by the employees is made unlawful. Under the Missouri Act, even after seizure, collective bargaining remains the process whereby the dispute must be settled, and the right to strike may be exercised when the immediate threat of disaster requiring State possession and operation is no longer present, even though the labor dispute has not been settled.

IV.

The King-Thompson Act was enacted under the police power to protect the public interest against imminent disaster by postponing, but by no means prohibiting, certain utility strikes. There is no absolute, constitutionally guaranteed, right to strike, *Dorchy v. Kansas*, 272 U.S. 306, 311. Under the Act, the exercise of the right to strike is postponed, but only in those situations in which the State has taken possession of the property of the utility, when neces-

sary to protect the public welfare, for use and operation by the State during the existence of a temporary emergency threatening the public interest with imminent disaster. Possession and operation by the State cannot extend beyond the temporary emergency period, even though the labor dispute has not been settled. The prohibition against a strike is limited to the temporary period of State possession and operation, and is necessary to effectuate the purpose of preventing imminent disaster which would result from interference with State operation. As thus construed, the Act is neither arbitrary nor capricious, nor does it deprive utility employees of the right to strike or interfere with free collective bargaining. There is no denial of due process.

Appellants' claim that the Act imposes involuntary servitude by prohibiting strikes has no basis under the record of this case. *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, 251. No person was compelled to work against his will or even to remain in the service of either the State or the utility, nor does the Act create any such compulsion. All that is prohibited is concerted action which has the effect of interfering with State operation undertaken to protect the public. The right to strike is in nowise affected except only as to the time such right may be exercised.

ARGUMENT

I.

THIS CASE IS MOOT BECAUSE THE INJUNCTION APPEALED FROM HAS EXPIRED BY ITS OWN TERMS.

The judgment appealed from enjoined appellants from striking against the State of Missouri. The injunction was issued after the Governor took possession of the property of the Company for the use and operation by the State of Missouri in the public interest. The sole question involved on the appeal to the Missouri Supreme Court was whether the appellants should be relieved of the restraint imposed by such injunction. No declaratory relief was sought in the pleadings or granted by the Court.

Subsequent to the decision of the Missouri Supreme Court affirming the injunction order, the Governor of Missouri by an Executive Order issued under date of December 28, 1962, vacated the seizure of the property effective at 11:59 P.M., January 12, 1963. See Appendix, *infra* (pp. 1a-3a). The Executive Order recited that the authority conferred upon the Governor to seize the property is exercisable only for the purpose of protecting the citizens of this State from disaster in an emergency situation and contained the finding that the continued exercise of such authority by the Governor was no longer justified.

It follows that as of 11:59 P.M., January 12, 1963, the properties of the Transit Company are no longer in the possession of the State and the seizure has terminated. As stated in appellants' brief (p. 58), the injunction "takes

its sole force and efficacy from the seizure." The Court below, in holding that the King-Thompson Act cannot be construed to make any provision for the permanent operation of a utility after seizure, specifically ruled that "there is no provision in the Act requiring state operation and control until a settlement of the labor dispute has been reached" (R. 184), that "the Governor may release the control of a utility's physical property at any time after seizure" and that "any such release would relieve appellants from the particular judgment entered in this case." (R. 183). This construction of the Act by the Court below is binding on this Court. *Kingsley International Pictures Corp. v. Regents of University of New York*, 360 U.S. 684, 688; *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 741; *Aero Mayflower Transit Company v. Board of Railroad Commissioners of Montana*, 332 U.S. 495, 499-500. Under these circumstances, appellants have been relieved of the injunction without the necessity of further action by this or any other court.

Under the King-Thompson Act, as construed by the Missouri Supreme Court, a permanent emergency situation is not envisaged thereby and a permanent injunction is not authorized (R. 184). Both the seizure and the injunction predicated thereon relate only to a purely temporary situation and may not extend beyond the duration of the purely temporary emergency. The Governor of Missouri found that the emergency situation no longer in fact exists, and for said reason released the property to the Company. Appellants are no longer enjoined from striking against the State of Missouri. And it is to be noted that the injunction order appealed from did not enjoin appellants from striking against the utility. In this situation, the present case, insofar as appellants in good

faith are seeking to be relieved from the consequences of the judgment appealed from, is moot.

From the inception of this litigation, appellants have urged that their right to strike has been prohibited. Their basic complaint against the injunction, from which alone they have appealed or have the right to appeal, is that it has the effect of preventing a strike against the utility. By his release of the property to the Company and the vacation of the seizure, the Governor of Missouri thereby removed all restraints upon appellants, so that they are presently, and have been since January 12, 1963, as free to strike as effectively as though the injunction had never been granted or the property seized. Hence, the real complaint of appellants at this time is not that there is presently any judicial restraint upon their free exercise of the right to strike, but rather that they have been relieved of this restraint by the action of the Governor and not by this Court.

It may well be asked in the instant case precisely what subject matter is presently in existence upon which the judgment of this Court can operate. All restraints against appellants having been removed by the vacation of the seizure, a reversal of the judgment of the Supreme Court of Missouri affirming the injunction would serve no useful purpose or grant appellants any relief. There is now "no actual controversy between the parties—no issue on the merits which this Court can properly decide." *Brownlow v. Schwartz*, 261 U.S. 216, 217; *United States v. Alaska Steamship Co.*, 253 U.S. 113, 116; *United States v. Hamburg-American Line*, 239 U.S. 466, 475-8. Any judgment of this Court relating to the right of appellants to strike would be advisory only in the circumstances of the instant case.

This Court has consistently refused to adjudicate cases which are, in fact, moot. Thus, in *Amalgamated Association of Street, Electric and Motor Coach Employees of America, Division 998, v. Wisconsin Employment Relations Board*, 340 U.S. 416, this Court held moot an action which arose out of the threatened strike which was involved in the *Amalgamated* case relied on by appellants. In the case held moot, arbitrators, acting under the Wisconsin Act, had rendered an award which was to be effective for one year from date unless sooner terminated by agreement of the parties. The award was superseded by agreement and, in any event, the one-year period had elapsed. This Court held, therefore, that "there being no subject matter upon which the judgment of this court can operate, the cause is moot."

In *Local No. 8-6 v. Missouri*, 361 U.S. 363, this Court declined to review, on the ground of mootness, the decision of the Supreme Court of Missouri upholding the validity of an injunction issued under the King-Thompson Act for the reason that the injunction had expired by its own terms. This Court stated: "Any judgment of ours at this late date 'would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other.' To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain." Appellants' Jurisdictional Statement, in requesting the case be advanced, correctly stated (page 26): "This Court in *Local No. 8-6* decided that the state injunction becomes moot when it expires upon the vacation of seizure." The *Local No. 8-6* case controls the disposition of the instant issue.

Just as in the *Local No. 8-6* case, the present injunction has expired by its own terms. The prohibition therein is directed at a strike against the State of Missouri subsequent to the seizure of the property of the Company for use and operation by the State. The Governor having released the property to the Company and terminated State possession and operation, there is no subject matter upon which the injunction can presently operate, and it has, therefore, expired by its own terms. The Governor found that a strike threat at this time no longer jeopardizes the public interest. The mere fact that the labor dispute between the Company and the Union has not been settled in no way affects the undisputed fact that the injunction from which appellants have sought to be relieved has expired by its own terms and no longer restrains or affects appellants' right to strike.

Harris v. Battle, 348 U.S. 803, is also directly in point, as this Court expressly held in the *Local No. 8-6* case. That case was one to enjoin the enforcement of a Virginia statute under which the Governor had ordered that possession be taken of a transit company whose employees were on strike. The employees, not the state, affirmatively sought both injunctive and declaratory relief in the circuit court. That court not only denied an injunction, but entered a declaratory judgment to the effect the state's seizure was valid. Yet this Court held that the subsequent settlement of the labor dispute and termination of the seizure made the controversy moot. In truth, it was not the settlement of the dispute but the termination of the seizure which was the decisive factor, for the reason that the Union's complaint was directed against the action of the State and the consequences thereof. This Court rejected contentions there made almost identical to those presently urged by appellants that "the controversy was not moot

because of the continuing threat of state seizure" and that the State's abandonment of its alleged unconstitutional activity "after its objective had been accomplished" should not be allowed to forestall a decision as to the validity of the statute under which the State had purported to act. The same contentions were rejected in *Local No. 8-6*.

The Governor released the property to the Company because the King-Thompson Act, as construed by the Missouri Supreme Court, simply does not authorize State possession and operation when the emergency situation threatening the public health, safety and welfare with impending disaster no longer exists (R. 184-185). In these circumstances, it was the mandatory duty of the Governor under the Act to vacate State possession, control and operation. The Governor could not properly permit the extraneous circumstance that an appeal is pending to affect his duty to release the property when the requisite jeopardy has ceased to exist. The State has no legal right to retain possession and control of the transit property for the sole purpose of avoiding mootness and permitting an adjudication by this Court.

Appellants argue that there is a possibility that the Company may again be seized. However, that is purely hypothetical, and in any event would depend upon facts which are presently not before this Court. The suggestion that seizure was vacated and the property released in bad faith and as a mere "manipulation" by the State of Missouri to prevent an adjudication by this Court is without any factual basis and improperly impugns the motives and integrity of the Chief Executive of Missouri. Such unfounded charge could be given consideration only if the Governor should again order the property of the Company seized without a substantial change in the underlying situation and should the State then seek a new injunction.

There is presently no dispute whatever between the parties in this case other than the academic dispute relating to the validity of certain sections of the King-Thompson Act. This is not a proceeding seeking a declaratory judgment on behalf of appellants relating to any or all of the provisions of the King-Thompson Act. The instant situation is wholly unlike those in which a defendant, by discontinuing the conduct complained of, seeks to avoid the grant of affirmative relief to an injured plaintiff. Here, it was not the defendants (appellants) but the plaintiff (the State of Missouri) which sought relief and obtained an injunction. The suit was filed and prosecuted, not for the benefit of appellants, but to protect the public interest during the existence of a temporary emergency.

The only legitimate purpose of the appeal from the judgment was to be relieved of the restraints imposed thereby. The action of the Governor has served precisely the same purpose. Hence, any further consideration of the issues of this case would constitute no more than the grant of an advisory opinion. As we read the decisions of this Court, it is not set up to vindicate hypothetical rights or render advisory opinions. The "duty of this Court 'is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (361 U.S. 363, 367, quoting *Mills v. Green*, 159 U.S. 651, 653.)

As stated in Stern and Grossman, *Supreme Court Practice* (3rd Ed. 1962), p. 434:

"The Supreme Court, like any other court, may lose jurisdiction over a case because of the occurrence of facts outside the record which terminate the controversy. The Court has constitutional jurisdiction only

over actual cases and controversies, between adverse interests, with respect to which the Court's judgment will be effective. If the controversy becomes academic by reason of changing circumstances, the Court's jurisdiction ceases."

That the underlying economic dispute in the present case had not been settled does not in any way alter the fact that there is no longer any subject matter upon which the injunction may presently operate. This case does not involve, nor is there a threat of, any penalties or other consequences of the conduct of appellants. The sole question decided by the Missouri Supreme Court was that the injunction was valid, and this injunction is no longer in effect. Seizure having been terminated by the Governor after investigation and determination that there is no factual emergency situation justifying the continuance of such seizure, the parties to the labor dispute are and have been since January 12, 1963, free to act as though such seizure had never taken place. The case is now moot in every respect.

II.

THE QUESTIONS PRESENTED ARE OF LIMITED SCOPE AND INVOLVE ONLY THAT SEVERABLE PART OF THE KING-THOMPSON ACT RELATING TO STATE SEIZURE AND OPERATION OF UTILITIES IN EMERGENCIES.

The questions presented by this appeal are by no means as broad and comprehensive as appellants seek to have decided. The Missouri Supreme Court considered the validity of the King-Thompson Act only insofar and to the extent particular sections thereof, held to be severable (R. 178-179), were immediately involved in the determination of the propriety of the injunction issued by the trial court

(R. 182). The Act as a whole was not before the Court for consideration (R. 186).

The determination of the appeal below did not involve the validity of any section of the King-Thompson Act relating to any compulsory hearing, fact-finding or recommendation procedures applicable to labor disputes in privately owned utilities. It did not involve the validity of any section of the King-Thompson Act which might be construed as prohibiting a strike against the utility during the pendency of the State seizure (R. 183). It did not involve the validity of any section of the King-Thompson Act providing for penalties or loss of employee rights as the result of a strike against the utility (R. 186). The existence of jeopardy to the public interest, health and welfare has been conceded by appellants and is not an issue (R. 171, 172-173, 185, 182). Likewise, the claim of extraterritorial operation of the King-Thompson Act or that it offends the Commerce Clause because it attempts to regulate interstate commerce have been expressly removed from the case by appellants (R. 174-175; 179).

The seizure of the property of the Company by the Governor was not predicated upon, nor even referable to, any refusal of the appellants to meet with, accept or abide by any recommendations made by the State Mediation Board (R. 164, 165, 132, 134, 136). On the contrary, the sole basis upon which the property was seized was the finding by the Governor that the threatened strike by appellants threatens the effective operation in Missouri of the utility and jeopardizes "the public interest, health and welfare." Hence, the sole question relating to the validity of the King-Thompson Act which is involved in this case is whether, in a situation in which the public interest, health and welfare are in fact jeopardized, as determined by the Governor and found by the court, a state law may

validly authorize the State to take possession of the physical properties of the utility "for the use and operation by the State of Missouri in the public interest" for a limited period of time during the existence of the temporary emergency resulting from a threatened strike.

A strike had been called against the Transit Company prior to seizure (R. 167). Such action was not in violation of the King-Thompson Act as construed by the Missouri Supreme Court (R. 187, 188). Subsequently, the Governor, after investigation, determined that the public interest, health and welfare were jeopardized by reason of the threatened interruption of the mass transportation operations in Missouri of the Company and that it was necessary that he take possession of the plants, equipment and facilities of the Company located in the State of Missouri "for the use and operation by the State of Missouri in the public interest" (R. 164-165). The strike previously called went into effect after seizure by the State, and the concerted refusal by the employees to work for the State was supported and participated in by appellants. This injunction suit was instituted by the State of Missouri as the result.

The question ruled by the Supreme Court of Missouri was the validity of the injunction issued by the circuit court, after hearing, restraining appellants "from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri" (R. 183, 175, 158). The issue, as stated by the Court, was "whether the police power of the state may be exercised in an emergency and pursuant to state statutes to take over and maintain the operation of the public transportation system of a great city when the public interest, health and welfare of the state is jeopardized as the result of the sudden interruption and discontinuance

of such service by reason of a strike by the employees of the transportation company against their employer" (R. 159).

Emphasizing that the transportation company was not a party to the action, the Court stated that "The basis of the proceeding is that the employees of the Company by a concerted refusal to *work for and under the supervision of the State*, after the Company's equipment and transportation facilities had been taken over by the State, have violated the law of the State" (R. 159). The Court further held "The Act does not prohibit or curtail strikes by employees, absent an emergency jeopardizing the health, welfare and safety to the public sufficient to authorize and sustain the action of the Governor in taking possession and control of the physical properties, plant and transportation facilities of the employer-company against which the strike is directed. Even then judicial action is required to obtain enforcement." (R. 182).

The only provisions of the King-Thompson Act which the Missouri Supreme Court considered in the determination of the instant case are Sections 295.010, 295.180, 295.200(1) and (6), and 295.210, RSMo 1959, to the extent they authorize State seizure and operation of a utility in an emergency and injunctive relief in aid thereof (R. 160-161). The Court specifically ruled that these sections of the Act are *severable* from and can stand independently of the remainder of the Act. In particular, the Court reaffirmed its prior holding that those sections of the Act which directly affected the State Board of Mediation, its legal existence, powers and duties, are severable from and do not affect the validity of those sections construed and applied in this case (R. 178-179).

It is well settled that this Court must accept the construction which the Supreme Court of the State has put

upon the State statute. As was held by this Court in *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740, the construction of the Act by the State court "is conclusive here," and this doctrine is also applicable to the construction of the severability of sections of a State law. To the same effect is *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572.

III.

THAT PART OF THE KING-THOMPSON ACT RELATING TO STATE SEIZURE AND OPERATION OF UTILITIES IN EMERGENCIES IS NOT IN CONFLICT WITH OR PRE-EMPTED BY THE LABOR-MANAGEMENT RELATIONS ACT, 1947.

Appellants urge that the Labor-Management Relations Act of 1947 has so completely pre-empted the field of labor relations as to preclude the State of Missouri from enacting any legislation for the protection of the public interest which in any way affects labor relations. They further urge that the decision of this Court in *Amalgamated Association v. Wisconsin Board*, 340 U.S. 383, controls this case. Appellee takes issue with both such contentions.

A. The Act Is a Valid and Proper Exercise of the Reserved Police Power, Enacted to Protect the Public Interest Against Disaster in an Emergency.

The police power of the State "is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government." *House v. Mayes*, 219 U.S. 270, 282. In that case, it was said that the police power includes the power "to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, public safety and the public

health, as well as to promote the public convenience and common good."

The exercise by the State of its police power should never be held to be superseded by federal legislation enacted in the exercise of a power granted by the Constitution "unless the repugnance or conflict is so direct and positive that the acts cannot be reconciled or stand together." *Missouri, Kansas & Texas Railway v. Haber*, 169 U.S. 613, 623. The reason is obvious. The police power is reserved to the State under the Tenth Amendment to the United States Constitution. The State should not be held to be deprived of this constitutional power unless no other conclusion is permissible. The purpose of Congress to suspend the exercise of the police power of the State should never be implied. Rather, the intent of Congress to effect such result must be clearly and expressly manifest. *Reid v. Colorado*, 187 U.S. 137, 148; *Kelly v. Washington*, 302 U.S. 1, 10; *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740, 749; *House v. Mayes*, 219 U.S. 270, 282. In *Illinois Central Railroad Co. v. Public Utilities Commission of Illinois*, 254 U.S. 493, 510, this Court stated the applicable principle in this language:

"In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."

This Court pointed out in *Kelly v. Washington* that application of the principle of nonexclusion of State authority "is strongly fortified when the state exercises its power to protect the lives and safety of its people. But the principle is not limited to cases of that description. It extends

to exertions of state power directed to more general purposes." (302 U.S., l.c. 10).

Appellee does not contend that federal legislation may be evaded by a State simply by calling the State legislation an exercise of the police power. On the contrary, appellee's position is that the King-Thompson Act, as applied in this case, is *in truth* an exercise of the police power and that there is no provision of the National Act which prohibits the exercise of such police power in these circumstances.

The ultimate object of the King-Thompson Act, as it relates to State seizure and operation, is the protection of the health, safety and welfare of the citizens of Missouri. The Court below, in construing those provisions of the King-Thompson Act relevant to the grant of an injunction, emphasized that "the purpose of seizure is the preservation of community life as encouraged and furthered by the state. The purpose of the Act is to protect its citizens against disaster" (R. 171, 184, 188).

There is no provision in the King-Thompson Act which authorizes or requires the Governor to take possession of the property of a utility simply because a strike is threatened or has been called by employees of such utility. Seizure of the property of a utility does not follow as a matter of course simply because of a strike or a threatened strike. A strike or a threat of one against a public utility may create an emergency. But even the mere existence of an emergency does not call the seizure provision of the Act into play. Only a particular, special kind of emergency authorizes State seizure and operation. It must be one which jeopardizes the public health, safety and welfare to a degree sufficient to create a threat of imminent disaster.

Since the enactment of the King-Thompson law there have been nine instances of strikes in public utilities in Missouri in which the Governor has determined that the public interest, health and welfare were threatened and has exercised the power conferred by Section 295.180 to take possession of the property of the utility involved (R. 194). There have, however, been twenty-one other instances in which strikes have occurred in public utilities in Missouri and in which the Governor has made no finding of threat to the public interest, health and welfare (R. 196). There having been no proclamation of the Governor, the strike was legal under the King-Thompson Act. The King-Thompson Act may be utilized only where vital public interests are jeopardized.

In the Missouri Supreme Court, appellants expressly conceded that the requisite jeopardy necessary to sustain the action of the Governor in seizing the property of the Company existed within the meaning of the King-Thompson Act (R. 171). Hence, whether the Court below correctly decided either the existence of imminent danger to the health, welfare and safety of the inhabitants of Kansas City, Missouri, or the impelling necessity that the property of the Transit Company be seized by the State for State operation in the public interest is not in issue on this appeal. Appellants have taken the position that *irrespective of the existence of jeopardy*, and *irrespective of any imminent peril to the community resulting from the work stoppage in a public utility*, those provisions of the King-Thompson Act which authorize seizure and State operation in the public interest with a temporary bar against a strike during such seizure period are wholly invalid as being in conflict with the federal law.¹

1. The Court below sustained the finding of jeopardy to the public interest, health and welfare as follows:

Appellee does not question the right of utility employees to engage in free collective bargaining backed by the right to strike. It does not question the right of such employees to engage in peaceful strikes to enforce union demands for wages, hours and working conditions against utility employers. The King-Thompson Act as construed by the Missouri Supreme Court does not prohibit free collective bargaining or peaceful strikes against public utilities to enforce union demands. What the Act does make unlawful is "the concerted refusal to work for the State in the operation of the utility after any such plant, equipment or facility has been taken over by the State in an effort to protect the public by use of the police power of the State" (R. 180).

Although it is conceded that employees of public service corporations have the right to engage in peaceful strikes to enforce their lawful demands, it does not follow that the guaranty of such right by federal law completely relieves such employees of all of their expressed and implied obligations assumed by them when entering into the employ of a public service corporation. Employees of public utilities, by entering into such employment, must necessarily acquiesce in subjecting their employment to the exercise

"A court could well find from the record in this case that the further continuance of the concerted work stoppage by the defendants under the circumstances shown and the continued failure of the defendants to operate the mass transportation system of the city with the facilities and equipment of the transportation company, which had been taken over by the State and were under the supervision and control of the State, might well have resulted in extreme danger to the health, welfare and safety of the inhabitants of Kansas City, Missouri, and in unrest, general confusion, disorganization, excitement, tension, inability to reach places of work in the retail district of the city, reduction of employment and loss of wages by innocent victims of the strike, congestion of traffic, disruption of business, reduction and impairment of law-enforcement agencies and the creation of havoc, disaster and general chaos in the community." (R. 172)

of the police power of the State in temporary emergency situations when the operating properties are taken over by the State. The King-Thompson Act which provides for State seizure and operation in temporary emergencies to protect the public from disaster necessarily becomes a part of their contract of employment, so that such employees may not cavalierly ignore the public interest inherent in such cases. There is no absolute "right" involved in this case which overrides in all instances and completely the exercise of the police power of the State in a reasonable effort to protect the public.

The King-Thompson Act is a proper exercise of the police power of Missouri which can be invoked only when the facts sufficiently justify the impelling necessity of emergency action to prevent irreparable damage and disaster to the public.

B. The Act Deals with the Protection of the Public and Does Not Interfere with Any Right Guaranteed by Federal Law.

The real question presented here is whether Congress, in enacting legislation for the purpose of regulating labor relations affecting commerce, has manifested an intent to remove from the State the necessary authority to act under the police power in an emergency situation "to safeguard the vital interests of its people," *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 434:

Appellee submits that particularly in a situation where the state legislation has for its purpose the protection of its citizens against disaster, the intent of Congress to override and overrule an exercise of the sovereign power of a state to protect the lives, health, safety and general welfare of its people should be expressly stated in language which cannot be misunderstood. Surely, due regard for the na-

ture of our federal system makes it particularly appropriate that Congress be explicit if it really intends to remove from a state the right to exercise its police power by taking possession of an essential public utility service for the purpose of operating such utility service for a limited emergency period solely to prevent imminent disaster to the citizens of the community.

The congressional intent evidenced by the National Act was to encourage the free flow of commerce by regulating labor relations between employer and employee. It was not intended to immunize from all state regulations conduct which jeopardizes the vital interests of the public. Of significance is the fact that the judgment appealed from in this case "does not purport to deal with the rights between the employer and the employees." (R. 183). "The employer-employee relation is not the subject matter of the action" (R. 188). "The trial court did not attempt to assume jurisdiction of a labor controversy or dispute, nor to decide any labor issues between employer and employee" (R. 175). The strike which was enjoined by the judgment (and which alone is authorized by the King-Thompson Act as construed by the Court below) was a strike against the State which jeopardized the public health, safety and welfare of the citizens of Missouri. Such a strike is not a protected activity under the National Act.

Section 1(b) of the National Act, 29 U.S.C., Section 141(b), specifically provides that employers and employees "above all recognize that *under law* neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest." This congressional declaration clearly indicates the congressional purpose to subordinate such acts and practices to the public health, safety and welfare.

The words "under law" as used in the National Act must necessarily include State law enacted to protect the interests of the public as well as federal law "because historically and traditionally the state governments have been vested with the protection of the public health, safety and interests under their general police powers." *State v. Local No. 8-6*, 317 SW2d 309, 319. It is to be noted that in those cases in which this Court has construed and applied Section 1(b) of the National Act it has looked to both federal and state law as the case required. Any other construction of Section 1(b) of the National Act would constitute a holding that Congress has manifested its intent that the "public health, safety and interest," as those terms are used in the National Act, are better served by permitting employees to freely strike at any time and under any circumstances without regard to the public welfare or irreparable damage to vital public interests.

There is no language in the National Act which justifies imputing to Congress the intent to callously deny to the State the right to protect the safety and welfare of the public merely to permit the free flow of goods in commerce. Appellee submits that it is not consonant with the proper relationship between our State and Federal governments to hold that Congress intended by the National Act to render a state helpless to protect the interests of its citizens which have been placed in grave jeopardy by the interruption of the operation of an essential public utility service.

The National Act protects the right of collective bargaining. It guarantees the right of peaceful striking. But when a strike is against the State and the public, so that it interferes with the operation of essential public utility services to an extent which places in jeopardy the public interests and involves a threat of imminent disaster, surely the State should have the right to protect its citizens dur-

ing the existence of the temporary emergency. And as the Court below pointed out, once the temporary emergency situation ceases to exist, the Governor is required by the King-Thompson Act to release the property.

The Missouri law does not and has not been construed by the Missouri Supreme Court to prevent free bargaining between the employer and the union. The Missouri law does not and has not been construed by the Missouri Supreme Court to authorize any outsider to fix any terms of employment or standards of working conditions. The Missouri law does not and has not been construed to prohibit employees from striking against a utility. The Missouri Supreme Court specifically ruled that the King-Thompson Act constitutes emergency legislation, and has construed the term "emergency" as used in the Act "to imply a temporary situation" (R. 184).

The Court below in the instant case specifically held that the Act did not authorize a permanent injunction prohibiting appellants from striking against either the Company or the State (R. 184). As construed by the Court, the Act does not deny the appellants the right to engage in a peaceful strike against the utility "except by the limitations which are imposed during emergency situations and only after state seizure" (R. 184). The Court pointed out, however, that the decree in this case which was appealed from does not deny the right of appellants to strike against the Company at all (R. 182, 191), and that issue was not decided by the Court. The Court made clear that its decision was limited to the particular issue presented, namely, the validity of an injunction prohibiting a strike against the State after the property of a utility has been seized for State operation pursuant to a finding that the public welfare has been jeopardized.

There is no provision of the National Act from which a congressional intent is manifest to give utility employees a preferred status so that they are removed from the impact of State legislation intended to preserve community life and protect the citizens of the State against disaster conditions which have been temporarily created. Nor is there any provision in the Federal Act which either specifically authorizes or impliedly justifies a strike against a State which has taken possession of the physical properties of an essential public utility for use and operation by the State for a period which may not extend beyond the duration of the temporary emergency during which the essential interests of the public are in jeopardy.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, although holding that the particular judgment was barred by the Federal Act, took note of the fact that "the Labor Management Relations Act 'leaves much to states, though Congress has refrained from telling us how much * * *.'" In the course of the opinion Mr. Justice Frankfurter stated:

"Due regard for the presuppositions of our embracing federal system * * * has required us not to find withdrawal from the states of power to regulate * * * where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act."

A similar thought is developed further in the *Garmon* opinion, where Mr. Justice Frankfurter states (l.c. 247):

"* * * the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed Congressional direction."

The principle to be derived from that case is simply that the states are not free to regulate conduct which is *plainly* within the central aim of federal legislation because that would involve too great a danger of conflict between the power asserted by Congress and requirements imposed by state law and thereby create potential frustration of national purposes. Appellee submits, however, that the King-Thompson Act, to the extent that the injunction issued in this case has been sustained by the Missouri Supreme Court, could not possibly frustrate actually or potentially any national purpose, either expressed or implied, in the National Act. And it may well be said here, in the language of this Court in the *Garmon* case, that the King-Thompson Act, to the extent here applicable, touches interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction it should not be inferred that Congress has deprived Missouri of the power to act to protect its citizens from disaster. It is difficult to imagine any case in the labor-management field stronger than the instant one as "deeply rooted in local feeling and responsibility" in which the compelling State interest in the maintenance of domestic peace and safety requires the holding that such interest has not been overridden by the National Act.

Appellee respectfully submits that in view of the policy as expressed in Section 1(b) of the National Act, any acts and practices which have the effect of truly jeopardizing public health, safety and welfare contrary to law, state or federal, must necessarily be unlawful, non-peaceful and beyond the protection of federal law. And since the State may take possession of the property of a public utility for the use and operation by the State of Missouri only when the Governor has made a determination, reviewable by the courts, that the "public interest, health and welfare are jeopardized," activities such as strikes

which have the effect of interfering with the operation of the utility by the State are no longer a protected activity during the temporary period of State operation.

A strike is not "peaceful" simply because of the absence of violence connected therewith. There are numerous decisions of this Court which make it clear that the right to strike is not an absolute right and that only "lawful" strikes come within the scope and intent of the National Act. Thus, a strike in violation of federal mutiny laws is not a protected activity. *Southern Steamship Co. v. National Labor Relations Board*, 316 U.S. 31. A sit-down strike, illegal under state law, is not a federally protected activity. *National Labor Relations Board v. Fansteel Metal Corp.*, 306 U.S. 240, 252. Intermittent work stoppages, prohibited under state law, likewise were not a protected activity under Section 7 of the Federal Act. *International Union v. Wisconsin Board*, 336 U.S. 245, 258-265. Mass picketing and violence arising out of a strike are not federally protected activities and are subject to state interdiction. *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740, 748-749; *United Automobile Workers v. Wisconsin Board*, 351 U.S. 266, 274-275.

The above examples are not all-inclusive. They are illustrative of situations in which strikes do not constitute protected activities under the National Act.

In *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740, this Court held that it would not lightly infer that Congress "by the mere passage of a federal act, has impaired the traditional sovereignty of the several states" in exercising their "historical powers over such traditionally local matters as public safety and order and the use of the streets and highways."

In *United Automobile Workers v. Wisconsin Board*, 351 U.S. 266, 274, this Court observed:

"The dominant interest of the state in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. * * *

"The States are the natural guardians of the public against violence. It is the local communities that suffer most from fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect."

The State of Missouri is the natural guardian of the health, welfare and safety of its citizens. To deny the State of Missouri the right to exercise its traditional authority in the fulfillment of its obligation to protect its citizens in emergencies would deny the State of Missouri its fundamental sovereign authority. Violence on a picket line is directed primarily against the employer and affects only a small segment of the public, yet it is definitely within the orbit of state regulation and excluded from protection under the National Act. *It should be all the more apparent, therefore, that where an entire community is threatened with disaster, the importance and necessity of State action to protect the public should be recognized and permitted.* The State should have the right to make unlawful concerted conduct which jeopardizes the public interest. This is particularly true when such strike can only be against the State after the State has taken possession of the utility for operation in the public interest.

Appellants argue that the construction of the King-Thompson Act by the Missouri Supreme Court to the effect that a strike against the State is prohibited only in conjunction with the possession of the utility by the State does not operate to validate the King-Thompson Act. This argument is premised upon the fact that this Court ruled in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.

579, that the President had no constitutional power to seize steel mills to avert a national emergency. Arguing from this premise, appellants contend that the power to seize which Congress withheld from the President to avert a national emergency it did not grant to the State Governor to avert a state emergency. What appellants overlook is that the power of a State Governor to seize the property of a utility could not be granted by Congress. The power to take possession of the utility property for use and operation by the State in an emergency threatening the State with disaster is and can be conferred upon the Governor only by State legislation enacted pursuant to the reserved police power of the State, a power which is inherent and not dependent upon congressional enactment.

Under the King-Thompson Act, as construed by the Court below, the State, upon taking possession of the physical properties of the Company, thereby has the *absolute right of control* of such properties and the operation of the utility. During the time the State is in possession, the utility may no longer control the operation thereof, even though as in this case it acts as the agent of the State for the purpose of effective operation (R. 174). After possession of the property is taken by the State, no employee of the utility is compelled to work or render service. However, if the utility's employees choose to remain in the employment of the utility during the period the State is in possession and control of the property, they are prohibited from interfering with *the State's operation* of the property by concerted action during such period.

It is not particularly relevant whether the employees become employees of the State during the time the State is in possession and control. What is of importance is that the properties are being operated for the use and benefit of the State in the public interest during a period of

emergency, and that during such period neither the employees of the utility nor any one else should have the right by concerted action to engage in any conduct which interferes with the action of the State taken to prevent disaster. As the Act is thus construed and applied, any strike during the possession and operation of the utility by the State is in actuality, as the Court below held, a strike against the State of Missouri and not a strike against the utility. And the injunction affirmed by the Court below barred only a strike against the State which threatened imminent disaster. Such a strike is not a protected activity under the National Act.

The basic fallacy of appellants' argument urging the "incompatibility of seizure with the National Act" is the assumption that seizure is a labor device which destroys the free exercise of the right of collective bargaining, by barring a resort to the strike weapon. On the contrary, "the King-Thompson Act deals with the protection of the public, after such a strike has been called or has been put into effect and after public safety, health and welfare is sufficiently endangered to require the State to be concerned with the operation of the utility and has taken possession of its physical property and seeks to operate the utility under its supervision to prevent public disaster" (R. 191).

Collective bargaining is not interfered with at all by the State's seizure and operation of the Company's property. Both the employer and employees know that the State cannot retain possession of the property except for a temporary period while the urgent emergency exists. Appellants' protestations to the contrary, both employer and employees know that the Act does not require State operation and control until the labor dispute is finally settled (R. 184). They know that the threat of a strike

against the employer has not been eliminated, and that it can be made effective the instant grave danger to the general public welfare is no longer present or threatened. Bargaining is no less meaningful.

Moreover, even where, as here, the State has appointed the utility as its agent as a reasonable means of operating the property in the public interest, the operation is nevertheless for and on behalf of the State. The Act did not compel the State to operate the property through the utility company, and the agency may be terminated at any time. In short, there is no incentive for the employer to refuse to consider the terms submitted by its employees. Both parties know that a strike may be called or continued when the public welfare is no longer threatened with imminent disaster. The right to use the strike weapon is postponed, not because the strike is against a utility, but because the time proposed for the use of such weapon in a particular utility strike involves substantial jeopardy to the public. The Act was enacted to protect the public, and does not affect any legitimate rights of appellants.

Appellants urge that the seizure in the present case involves only paper possession of the utility. However, the fact of possession and the right of control derived therefrom cannot be disputed. And appellants' answer specifically admitted the fact of possession (R. 131). The power of the State to exercise control in another manner is still present. Moreover, if the seizure is not sufficiently real such fact would affect only the propriety of the particular seizure and not the inherent validity of the statute pursuant to which the seizure was made.

As the decisions of this Court make clear, a state law, particularly one enacted in the exercise of the police power, should not be struck down unless it has been demonstrated to be wholly irreconcilable with the federal act. Adjust-

ment of state and national interests may not be attained "by reliance on uncritical generalities or rhetorical phrases unnourished by the particulars of specific situations." Mr. Justice Frankfurter (dissenting), *Amalgamated Association v. Wisconsin Board*, 340 U.S. 1.c. 403.

To the extent that appellants' right to strike is affected by the King-Thompson Act and by the injunction issued in this case, there is at most no more than a temporary postponement of such right for a period which, under no circumstances, may extend beyond the existence of the temporary emergency which threatens the public health, safety and welfare with disaster and during which the utility is operated by and on behalf of the State. The Missouri Act does not prohibit public utility strikes. It does not take away from public utility employees the right to strike as a weapon in the process of collective bargaining. Such weapon remains intact and may be utilized when possession of the property by the State has been terminated and the utility is no longer being operated by and on behalf of the State.

Hence, the Act as construed by the Court below is of limited scope and application, and may be resorted to only for the protection of the public when an emergency places the public welfare in imminent jeopardy. The King-Thompson Act, having been enacted in pursuance of the State's dominant local concern in the protection of the public health, safety and welfare, and being applicable only in a temporary emergency situation which results in actual or imminent danger and jeopardy to the public, there is no conflict with the policy or purpose of the National Act. The obligation to protect the citizens of the State is a fundamental reason for its existence. If the State is to be rendered helpless to protect its citizens during the ex-

istence of local emergency situations, it would follow that disaster could ensue.

Section 13 of the National Act (29 U.S.C., Section 163), guaranteeing the "right" to strike, specifically provides that nothing in the Act shall be construed "to affect the limitations or qualifications on that right." An inherent limitation on that right is that it be exercised with due regard for the public health, safety and welfare. A strike timed to be inimical to the public interests should not be beyond the power of the State to postpone.

The reasoning of Mr. Justice Frankfurter, in his dissenting opinion in *Amalgamated Association*, if applied to the King-Thompson Act as construed by the Missouri Supreme Court in the instant case is cogent and convincing. He there pointed out:

"Due regard for basic elements in our federal system makes it appropriate that Congress be explicit if it desires to remove from the orbit of State regulation matters of such intimate concern to a locality as the continued maintenance of services on which the decent life of a modern community rests * * *. (340 U.S. l.c. 403).

"The real issue before the Court is whether the * * * legislation so conflicts with the specific terms or the policy fairly attributable to the provisions of the federal statute that the two cannot stand together." (340 U.S. l.c. 404).

"I find no indication in the (federal) statute that the States are not * * * free to protect the public interest in State emergencies." (340 U.S. l.c. 409).

Mr. Justice Frankfurter pointed out that the exercise by the State of its police power which would be valid if not superseded by federal action is superseded only where the repugnance or conflict is so direct and positive that

the two acts cannot be reconciled or consistently stand together. He reviewed decisions of this Court which justified his conclusion that:

"The states are not precluded from enacting laws on labor relations merely because Congress has—to use the conventional phrase—entered the field." (340 U.S. l.c. 403).

Mr. Justice Frankfurter discussed the "right" to strike and pointed out that such word is "one of the most deceptive of pitfalls." * * * We have several times rejected an invitation to decide cases upon the basis of an absolute right to strike. * * * May the 'right' to strike be also limited by an otherwise valid State statute aimed at preventing a breakdown of public-utility service?" (340 U.S. l.c. 404).

"But the historic amenability to legal control of public callings is rooted deep. * * * A stoppage in utility service so clearly involves the needs of a community as to evoke instinctively the power of government. This Court should not ignore history and economic facts in construing federal legislation that comes within the area of interacting State and federal control. To derive from the general language of the federal act a 'right' to strike in violation of a State law regulating public utilities is to strip from words the limits inherent in their context." (340 U.S. l.c. 405).

- C. **Amalgamated Association Construed a Wisconsin Law, Not Limited to Emergencies, Which Absolutely Prohibited All Strikes in Public Utilities and Substituted Compulsory Arbitration for Collective Bargaining. The Missouri Act Is Fundamentally Different in Scope, Purpose and Application and Is Not Controlled by Amalgamated.**

~~Neither the facts nor the statute involved in Amalgamated Association v. Wisconsin Employment Relations~~

Board are comparable to those adjudicated in this case. This Court summarized the Wisconsin Act as follows (340 U.S. 1.c. 388):

"In summary, the Act substitutes arbitration upon order of the Board for collective bargaining whenever an impasse is reached in the bargaining process. And, to insure conformity with the statutory scheme, Wisconsin denies to utility employees the right to strike." (Emphasis supplied).

The Wisconsin Act expressly declared it to be unlawful for utility employees to strike. This Court took particular note of this prohibition in declaring that Wisconsin sought "to deny entirely a federally guaranteed right" (340 U.S. 394), and that Wisconsin sought "to abrogate that right altogether" (340 U.S. 395-396).

The existence of jeopardy under the Wisconsin Act was wholly irrelevant. Compulsory arbitration in the event of an impasse in negotiations was at the very heart of the law. Hence, true collective bargaining was rendered ineffective by the Wisconsin Act, and the policy of the federal statute that the right of bargaining should not be hampered or destroyed was necessarily interfered with by the state law. Once an impasse was reached, further bargaining in the sense authorized by the federal law was prohibited. And since any right to strike against the utility was in terms prohibited, it is evident that the employees could not bargain effectively. The injunction which was issued in the *Amalgamated* case prohibited a strike against the utility which would cause an "interruption" of its service. It was issued, not because the state had taken possession of the utility nor because of any necessary finding of jeopardy to the public interest by reason of which possession was taken, but simply and solely because any strike against a utility was absolutely unlawful in Wisconsin.

The Missouri statute, on the other hand, makes striking unlawful (Section 295.200, RSMo), *only* after the Governor has determined that the public interest, health and welfare are jeopardized and has seized the property of the utility "for use and operation by the State of Missouri in the public interest" (Section 295.180, RSMo). The Supreme Court of Missouri recognized that until such time, the Missouri law does not make *any* strike by public utility employees unlawful. And, as shown *supra*, seizure is neither required nor permissible absent a finding, subject to judicial review, of substantial jeopardy to the public interest.

In ruling *Amalgamated*, this Court stated (340 U.S. 398):

"It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in industries covered by the Federal Act, has *forbidden* the exercise of rights protected by the Federal Act." (Emphasis supplied).

In view of the emphasis placed in the *Amalgamated* case by this Court upon the fact that the Wisconsin Act prohibited strikes altogether, appellee submits that the fact that the Missouri law makes strikes unlawful only in the event of a substantial threat to the public interest, health and welfare is highly significant.

In *Amalgamated* the Wisconsin statute was described by the Court as "a comprehensive code for the settlement of labor disputes between public utility employers and employees" (340 U.S. 393) primarily because it substituted "arbitration upon order of the board for collective bargaining whenever an impasse is reached in the bargaining process" (340 U.S. 388). The Wisconsin statute made the findings of the arbitrators binding upon parties to a labor dispute subject only to the right of judicial review.

This Court also found in *Amalgamated* actual conflict between the Wisconsin Act and the National Act in two respects relating to collective bargaining. The Wisconsin Act required collective bargaining only until an impasse was reached (Wisconsin Statutes, 1949, § 111.52). The federal act requires continued collective bargaining even after a strike. 340 U.S. 388, 399. The Missouri statute does not attempt to terminate collective bargaining at any stage of a labor dispute. Under the Missouri Act, even after a strike or seizure, collective bargaining remains the process whereby the dispute must be settled.

This Court, in *Amalgamated*, further pointed out that the employer could, and did under the Wisconsin Act (Wisconsin Statutes, 1949, § 111.58), refuse, in the arbitration procedure, to consider certain union demands which were properly subjects of collective bargaining between the parties to a labor dispute.

The Missouri statute is definitely not a "comprehensive code for the settlement of labor disputes." It does not embody compulsory arbitration. *State ex rel. State Board of Mediation v. Pigg*, 362 Mo. 798, 244 SW2d 75, 81.

The Court below, in distinguishing *Amalgamated*, stated:

"The King-Thompson Act makes no provision for arbitrators who shall hear and finally determine labor disputes, nor does the King-Thompson Act deny to utility employees the right to strike. No issue as to compulsory arbitration is presented on this record. The Act does provide for the safety of the public in the event of a strike and the Governor's finding of emergency and for judicial proceeding after the State has taken possession of the utility's property. There is no provision in the King-Thompson Act purporting to provide for concurrent state regulation of peaceful

strikes for higher wages. In any event that is not the issue in this case." (R. 188).

A vital distinction between the Wisconsin statute and the Missouri Act is that the Wisconsin statute was not exclusively an emergency measure, whereas the Missouri Act is, having as its purpose the protection of the citizens of the State against disaster (R. 171, 182, 184, 188). With respect to the Wisconsin Act, this Court stated (340 U.S. l.c. 393, 394):

"However, the Wisconsin Act before us is not 'emergency' legislation but a comprehensive code for the settlement of labor disputes between public utility employers and employees. Far from being limited to 'local emergencies,' the act has been applied to disputes national in scope, and application of the act does not require the existence of an 'emergency.'" (Emphasis supplied).

Concededly, this Court, in *Amalgamated*, used language which, out of context, might be taken to exclude the states from acting as a result of strikes in public utilities even in emergency situations. However, the question actually decided in that case was that a state law, not limited to emergencies, could not absolutely prohibit strikes in public utilities subject to the federal acts, and substitute compulsory arbitration for collective bargaining. This Court clearly found the Wisconsin statute not to be "emergency legislation" (340 U.S. 393). Since such was the nature of the statute before it, any declarations in *Amalgamated* which purport to invalidate actual emergency state legislation are purely dictum. See *Comment*, 49 *Mich. Law Rev.* 1077, 1079 (1951); also *Annotation*, 22 *A.L.R.2d* 894, 896.

The Missouri statute is, of course, actual emergency legislation insofar as it has an effect upon the right to strike.

The Missouri Supreme Court characterized the Act as "strictly emergency legislation," * * * "justified under the police powers." "The purpose of the Act is to protect * * * citizens against disaster" (R. 171). The emergency characteristics of the seizure provisions of the Missouri Act are illustrated by the actual operation of the Act. Not every utility strike calls for State seizure.

The right and obligation of the State to protect the health and safety of its citizens in emergency situations have repeatedly been recognized. Among situations where emergency state action has been upheld are the so-called "clear and present danger" cases where it has been recognized that state action may be permitted in such circumstances although the restriction involved might otherwise infringe upon constitutionally protected rights. *Feiner v. New York*, 340 U.S. 315, 320; *Cantwell v. Connecticut*, 310 U.S. 296, 308.

Emergency state legislation has been upheld although in the absence of emergency the legislation might well have infringed federal constitutional provisions, such as the contract clause. *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398.

Certainly, the State's authority should not be thwarted and fulfillment of its obligation to protect its citizens in emergency situations must not be precluded because the threat to the citizens arises in a labor dispute. The so-called "right" to strike has never been equated to any constitutional guaranty. *Dorchy v. Kansas*, 272 U.S. 306, 311. Appellants' position, if sustained, would elevate such activity above constitutionally protected rights. Furthermore, the very Act of Congress, which is relied upon as the basis of the "right" here claimed, shows that it is subject to limitations. Labor Management Relations Act,

1947, § 13, 29 U.S.C., § 163; *International Union v. Wisconsin Board*, 336 U.S. 257, 260. One limitation must be that in situations of imminent danger to the health and safety of the community the public interest must prevail.

As emergency legislation, the Missouri statute stands on a far different footing from the Wisconsin statute involved in the *Amalgamated* case. That fact, together with the other substantial differences between the Missouri statute and the Wisconsin act, removes the Missouri law from the scope of the *Amalgamated* decision.

Insofar as the Wisconsin Act involves "emergencies," it is premised upon the theory that *any* interruption of a public utility service of itself constitutes an emergency and justifies comprehensive regulation of labor relations by compulsory arbitration coupled with an absolute ban on strikes. On the other hand, the King-Thompson Act, as construed by the Missouri Supreme Court, is based on a completely different philosophy. Unlike Wisconsin, the Missouri Act does not prohibit strikes simply because a labor dispute will cause or is likely to cause the interruption of a utility service. Not every so-called "emergency" calls the Missouri Act into operation. There must be a finding by the Governor, sustained by a court of equity, that the particular emergency is of a character which jeopardizes the public interest, health and welfare sufficiently to pose a threat of disaster. Wisconsin did not so limit the operation of its Act. Any danger or jeopardy to the public was merely coincidental, and therefore could not validate the Wisconsin Act.

Whatever may be said with respect to the Wisconsin Act, which wholly prohibited the right to strike against a utility in any and all situations, emergency or otherwise, unlimited by the existence or extent of jeopardy to the public interest, it does not follow that a state may not en-

act legislation of limited scope and application in the exercise of its police power for the protection of the public. Missouri's Act, to the extent it authorizes seizure and State operation of the utility, is based entirely upon the inherent right of self-preservation of a sovereign State during a temporary emergency threatening disaster, and does not purport to regulate labor relations. No other part of the Act is involved on this appeal.

There is nothing in the congressional history relating to the National Act which supports appellants' claim that Congress intended to extend the rule of *Amalgamated* to the totally different kind of legislation involved in this case. This Court, in *Amalgamated*, noted that the proposal rejected by Congress for public utilities was a denial of the right to strike, together with the substitution of compulsory arbitration in public emergencies, local or national. This Court pointed out that such rejected scheme was the "pattern of the Wisconsin Act" (340 U.S. 394-395). Such is, furthermore, the pattern of the scheme described in the remarks of Senator Taft and quoted by this Court in *Amalgamated* (340 U.S. 395, Footnote 21), as among the schemes which the committee had rejected. According to the statement of Senator Taft, such plan was rejected because it involved "a process of the government fixing wages" and because, if such process were available, whichever party might feel that it would receive better treatment as a result would not "make a bona fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided." His remarks show quite clearly that the proposal which the Senator was describing as having been rejected by the committee was likewise in the "pattern of the Wisconsin Act."

Subsequent to the decision in the *Amalgamated* case, Senator Taft indicated that the implications drawn by this

Court from his remarks were not in accord with his understanding of Congressional intention. See *Report of Hearings before Senate Committee on Labor and Public Welfare on Proposed Revisions of the Labor-Management Relations Act of 1947, 83rd Congress, First Session, 1953, Part 1, page 284*, where Senator Taft stated: "I may say that we never intended any pre-emption of the field. The Supreme Court has gone beyond what we intended."

The proposals thereafter submitted to Congress contained broad and sweeping language designed to authorize state laws providing for compulsory arbitration and an absolute bar on public utility strikes—the pattern of the Wisconsin Act, as well as other and even more restrictive legislation. The remarks of then Senator John F. Kennedy in connection with the 1959 amendment proposed by Senator Holland demonstrated that the proposal did not relate to statutes such as that of Missouri. He stated (105 Cong. Rec. 6740) that there was no warrant "for acceptance on the floor of the Senate of what is in effect a measure for compulsory arbitration, particularly when the courts have the power to act in cases in which the health, safety, and basic welfare of the citizens of the state are at stake. The courts have been given by the states the power to seize industries to protect the public health and safety." Thus, it is obvious that Senator Kennedy argued against the Holland amendment on the specific ground that the states still had the inherent authority to act in the limited emergency situations to which the King-Thompson Act is exclusively applicable.

The Missouri statute, not involving compulsory arbitration, or an absolute ban on utility strikes, is not of the pattern of schemes rejected by Congress. There is nothing to be gathered from the legislative history of the federal enactments and proposals to show that Congress intended

to exclude state action in accordance with the plan embodied in the Missouri statute.

The 1959 Amendment of Section 14 of the National Act in nowise constitutes any expression of congressional purpose to deprive the states of the power to enact emergency legislation such as the King-Thompson Act. That amendment simply provides that the National Labor Relations Board may decline to assert jurisdiction over a labor dispute where in the opinion of the Board the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction and authorizes the courts of any state to assume jurisdiction of labor disputes having an inconsequential effect on commerce, it was not at all directed to the problem of the possible effect of a labor dispute on the life of a community. It had only to do with the question of whether the National Labor Relations Board should be involved in the dispute. The right of the State to seize properties of a public utility and operate the same is not remotely involved in this Amendment. No intent appears to exclude the right of a State to act in emergency situations or to exercise its police powers.

The King-Thompson Act, to the extent involved in this case and as construed by the Missouri Supreme Court, is consistent with the National Act both before and after its amendment and does not operate to deprive utility employees of any rights guaranteed to them by federal law. Limited as it is to the temporary period of State possession and operation of the utility, the denial of a right to strike at will when jeopardy to the public welfare would result is not an impairment of federal policy or in conflict with the National Act.

IV.

**THE KING-THOMPSON ACT AS CONSTRUED AND
APPLIED BY THE MISSOURI SUPREME COURT
DOES NOT DENY DUE PROCESS OR RESULT IN
INVOLUNTARY SERVITUDE.**

Appellants argue the abstract proposition that the King-Thompson Act is invalid as denying due process of law, upon the premise that it prohibits a utility strike without substituting an equivalent for it. In making this contention, appellants wholly ignore not only the construction placed upon the Act by the Court below, but the judgment appealed from. Appellants were enjoined from striking against the State of Missouri during the period of the temporary emergency and while the State was in possession of the properties of the Company. The employees have not been deprived of the right to strike against the Company. Moreover, even the injunction against a strike while the State of Missouri is in possession is for a limited period only. The right to use the strike weapon is only temporarily postponed, not prohibited, by the injunction issued under the Missouri Act, and then only to the extent necessary to protect the public welfare. The action was taken by the State under the police power, which **extends** to all the great public needs, particularly when deemed **immediately** necessary to the public welfare. *Day-Brite Lighting, Inc., v. Missouri*, 342 U.S. 421; *Noble State Bank v. Haskell*, 219 U.S. 104, 111.

The argument relating to due process is predicated upon the theory that collective bargaining without the right to strike is meaningless in that it deprives the employee of the power to make effective demands. But since the basic premise of appellants is erroneous, it follows that appellants could not have been deprived of due process. The employer knows that a strike may follow if satisfactory

terms are not agreed upon. The employer also knows that the State will not and cannot retain possession of its property except during the temporary emergency period. Hence, in any event, the threat of a strike as an economic weapon to enforce union demands still hangs over the employer after the seizure as well as before.

Appellants argue that the "fatal" defect in the Missouri Act is that it is arbitrary and capricious in that it deprives them of the only effective weapon in the struggle with their employer. To the contrary, the statute recognizes the continued existence of the weapon but merely affects the timing of its use. The due process clause is not to be so broadly construed that the State Legislature "is put in a strait jacket" in dealing with conditions involving an immediate threat to the public welfare. *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-7. Due process requires only that the law be not unreasonable, arbitrary or capricious. Surely, a statute enacted under the police power which has for its sole object the protection of the public interest against imminent disaster by postponing, but by no means prohibiting, a strike cannot be deemed to be unreasonable, arbitrary or capricious.

Appellants' argument is directed against statutes such as this Court held invalid in the Wisconsin *Amalgamated Association* case and has no application to the King-Thompson Act as construed by the Missouri Supreme Court. In truth, appellants' contention, though not so spelled out in its argument, is that due process requires that the employees have the right to exercise the strike weapon at any particular instant the union chooses, even though by its choice of a particular instant the public rather than the employer is substantially affected, and disaster to the public may ensue.

The "right" to strike has never been equated to any constitutional guaranty. *Dorchy v. Kansas*, 272 U.S. 306, 311. Missouri makes no attempt to "absolutely prohibit" such right. Insofar as due process is concerned, it should be sufficient that the right to strike exists and is recognized rather than such right be authorized for use at a time when it will result in grave jeopardy to the public health, safety and welfare. "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community." Mr. Justice Brandeis (dissenting) in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488.

The further contention that the King-Thompson Act results in "involuntary servitude" is a purely hypothetical argument wholly unwarranted by any facts in this case. Section 295.210 of the King-Thompson Act provides that no employee shall be required to render labor service without his consent and that the Act shall not be construed so as to make the quitting of his job by an individual employee an illegal act. The injunction in this case is directed solely against a strike or concerted refusal to work during the temporary period of State operation and under no circumstances compels any individual employee to continue in the service of either the State or the utility. Appellants' argument is based upon the erroneous theory that the King-Thompson Act contains an absolute prohibition against the right to strike, whereas in truth the right is recognized and in nowise affected except only as to the time at which it may be exercised. The record in this case wholly fails to support any contention that any person has been compelled to work against his will. There is no live issue in this case respecting involuntary servitude.

What this Court said in *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, 251, is peculiarly apposite here:

"The Union contends that the statute as thus applied violates the Thirteenth Amendment in that it imposes a form of compulsory service or involuntary servitude. However, nothing in the statute or the order makes it a crime to abandon work individually (compare *Pollock v. Williams*, 322 U.S. 4, 88 L. Ed. 1095, 64 S. Ct. 792) or collectively. Nor does either undertake to prohibit or restrict any employee from leaving the service of the employer, either for reason or without reason, either with or without notice. The facts afford no foundation for the contention that any action of the State has the purpose or effect of imposing any form of involuntary servitude."

CONCLUSION

For the reasons stated, this case is moot, and the appeal should be dismissed. Should the Court consider the appeal on the merits, the judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

THOMAS F. EAGLETON,
Attorney General,

J. GORDON SIDDENS,
Assistant Attorney General,

JOSEPH NESSENFELD,
Assistant Attorney General,

JOHN C. BAUMANN,
Assistant Attorney General,
Supreme Court Building,
Jefferson City, Missouri,
Attorneys for Appellee.

EXECUTIVE ORDER

Warren E. Hearn, Secretary of State

(Filed December 28, 1962.)

WHEREAS, on November 13, 1961, I issued my Proclamation declaring that, as a result of a labor dispute between Kansas City Transit, Inc., a public utility furnishing public passenger transportation service in the State of Missouri, and Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, the recognized bargaining agent of the employees of Kansas City Transit, Inc., a strike threatened to interrupt the operation of Kansas City Transit, Inc., in the State of Missouri, and that such threatened strike and threatened interruption of the operation of Kansas City Transit, Inc., jeopardized the public interest, health and welfare; and

WHEREAS, by said Proclamation of November 13, 1961, I declared that the exercise of the authority vested in me by Chapter 295, and particularly Section 295.180, RSMo 1959, was necessary to insure the operation in Missouri of Kansas City Transit, Inc., a public utility, and

WHEREAS, by my Executive Order No. 1, dated November 13, 1961, I did, by virtue of authority vested in me by Chapter 295, and particularly Section 295.180, RSMo 1959, take possession of the plants, equipment and all facilities of Kansas City Transit, Inc., located in the State of Missouri, for the use and operation by the State of Missouri in the public interest, effective at 11:59 o'clock P.M., Central Standard Time, Monday, November 13, 1961, and

WHEREAS, by my Executive Order No. 2, dated November 13, 1961, I ordered that Daniel C. Rogers, Chairman of the Missouri State Board of Mediation, acting as

my agent, take possession of the plants, equipment and facilities of Kansas City Transit, Inc., in the State of Missouri, for the purpose of carrying out the provisions of said Order No. 2, said Proclamation and said Order No. 1, and

WHEREAS, the labor dispute between Kansas City Transit, Inc., and Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America remains unresolved, and

WHEREAS, the authority conferred upon me by Chapter 295, and particularly Section 295.180, RSMo 1959, is exercisable only for the purpose of protecting the citizens of this State from disaster in an emergency situation, and

WHEREAS, after investigation, I find that continued exercise by me of such authority is not justified in the circumstances of the aforesaid labor dispute.

NOW, THEREFORE, I, JOHN M. DALTON, GOVERNOR OF THE STATE OF MISSOURI, under and by virtue of the authority vested in me by the Constitution of Missouri and the statutes, including Chapter 295, RSMo 1959, do hereby order that the effect of my aforesaid Proclamation of November 13, 1961 shall terminate at 11:59 P.M. o'clock on Saturday, January 12, 1963; and

I further order that the seizure, pursuant to said Executive Order No. 1, dated November 13, 1961, by the State of Missouri of the plants, equipment and facilities of Kansas City Transit, Inc., located in the State of Missouri shall terminate at 11:59 P.M. o'clock, on Saturday, January 12, 1963; and

I further order that Daniel C. Rogers, acting as my agent, shall relinquish all direction and control over the plants, equipment and facilities of Kansas City Transit,

Inc., effective at 11:59 P.M. o'clock, on Saturday, January 12, 1963.

Done this 28th day of December, 1962.

/s/ John M. Dalton

(SEAL)

GOVERNOR

ATTEST:

/s/ Warren E. Hearn

SECRETARY OF STATE

/s/ Austin Hill

DEPUTY SECRETARY OF STATE

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 604

**DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF
STREET, ELECTRIC RAILWAY AND MOTOR COACH
EMPLOYEES OF AMERICA, ET AL., Appellants.**

v.

STATE OF MISSOURI, Appellee.

On Appeal From the Supreme Court of Missouri

REPLY BRIEF FOR APPELLANTS

BERNARD CUSHMAN
5025 Wisconsin Ave, N.W.
Washington 16, D. C.

BERNARD DUNAU
912 Dupont Circle Building
Washington 6, D. C.

JOHN MANNING
3333 Warwick Boulevard
Kansas City, Missouri
Attorneys for Appellants

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 604

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF
STREET, ELECTRIC RAILWAY AND MOTOR COACH
EMPLOYEES OF AMERICA, ET AL., *Appellants*.

v.

STATE OF MISSOURI, *Appellee*.

On Appeal From the Supreme Court of Missouri

REPLY BRIEF FOR APPELLANTS

I. FEDERAL SUPERSESSION

1. Appellee's essential theme is that seizure and the consequent prohibition of the strike are "temporary" in duration limited to the period of the "emergency" and may be ended sooner than settlement of the labor dispute (br. pp. 29, 31, 32, 37, 39, 48, 50, 52). The theme rests on the statement of the court below that "Seizure and injunctive relief are provided only in emergency

situations. We must and do construe the term 'emergency' to imply a temporary situation and necessarily dependent upon the particular facts of the particular case under consideration" (R. 184). The apparent thrust of the theme is that since seizure need not last forever, the prohibition of the strike for an indeterminate period does not impair the exercise of the federal right.

The theme can hardly survive its statement. The court below rendered its opinion almost eleven months after seizure but its judgment did not disturb its continuance. We have therefore an authoritative judicial determination that seizure does not endure too long if it lasts eleven months. The Governor of Missouri did not vacate the seizure until three months later. We have therefore an authoritative executive determination that seizure can last at least as long as fourteen months. And since seizure was vacated without any change in the underlying situation which originally caused its institution, there is no basis for belief that a renewed strike would not recreate the "emergency" and bring about reimposition of seizure.

Reduced to concrete terms, therefore, appellee claims that it is free to prohibit the strike for fourteen months, and then suspend the prohibition but without relinquishing the power to reinstitute it. This is the practical equivalent of a flat ban. Even disregarding the danger of a resumed interdict of the strike, suppression for fourteen months destroys the efficacy of the strike as the "force depended upon to facilitate arriving at satisfactory agreements." A concrete bargaining situation existing in the present cannot be

¹ *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 291.

influenced by a strike which cannot take place until fourteen months later. The bargaining situation cannot be put in storage, with the strike as a deadlock-breaking instrument interred for fourteen months, and with the hope of current enjoyment of improvements abandoned for the long interval. Settlement upon whatever terms the employees can obtain without the backing of a strike is the inevitable consequence. In each of the eight utility seizures other than the instant one, settlement was reached before seizure was lifted, well before the elapse of fourteen months, and hence well before the impact of a strike threat could exert itself. No employer is so timorous that he fears a strike which cannot eventuate until an indeterminate future. In this case at this writing, settlement has not been effectuated simply because the employees determinedly committed themselves to a fight for vindication of their federal right to strike and to a refusal to accept an accord which did not reflect the untrammelled influence of that right. But once granted that the seizure-no-strike formula is valid, there is no realistic alternative to submission to settlement which is the product of emascuolated negotiation. It is idle cant for appellee to assert that "Collective bargaining is not interfered with at all by the State's seizure and operation of the Company's property" (br. pp. 37, 51-52).

It thus palliates nothing for appellee to claim that the "right to use the strike weapon is postponed" (br. p. 38), "not prohibited" (br. p. 51), and that the statute "merely affects the timing of its use" (br. p. 52). It is not even accurate to say that resort to a strike is simply "postponed," for unless the Governor is persuaded that "upon the particular facts of the par-

particular case under consideration" the "emergency" has ceased (R. 184), the postponed event never arrives; and if it does arrive, it comes as so late, unpredictable, and undependable an eventuality that it is practically meaningless. This aside, assuming a genuinely limited postponement of determinable duration, appellee's position is no better taken. This Court invalidated a far milder Michigan statute, which suspended recourse to a strike pending state mediation efforts and strike authorization by a majority vote of the employees in the unit, because "it conflicts with the federal Act," *U.A.W. v. O'Brien*, 339 U.S. 454, 458. This Court explained that (*ibid.*):

The Michigan law calls for a notice given "In the event the parties . . . are unable to settle any dispute" to be followed by mediation, and if that is unsuccessful, by a strike vote within twenty days, with a majority required to authorize a strike. Under the federal legislation, the prescribed strike notice can be given sixty days before the contract termination or modification. § 8(d). The federal Act thus permits strikes *at a different and usually earlier time* than the Michigan law; and it does not require majority authorization for any strike. [Emphasis supplied.]

The same conflict which prohibited Michigan also forbids Missouri from postponing a strike to a different and later time than is federally prescribed. The only difference between *O'Brien* and this case, other than the much harsher impact of Missouri's command, is that in *O'Brien* auto workers struck a car manufacturer and in this case bus drivers and mechanics struck a transit company. But "Creation of a special classification for public utilities is for Congress, not for this Court." *Amalgamated Association*, 340 U.S. at 392.

393. Contrary to appellee's claim, there is no question of giving "utility employees a preferred status" (br. p. 32); appellants desire to preserve for them the same status that Congress has vouchsafed all employees; it is appellee who would impose inferior rank on the utility worker. Whether that subordination should be accomplished is for Congress.²

² In the present session of Congress Senator Holland has again introduced a bill, pertaining to "an employer engaged in the business of furnishing water, gas, electric power, or passenger transportation services to the public," which would amend section 14 of the National Labor Relations Act to provide that "Nothing in this Act or the Labor-Management Relations Act, 1947, shall be construed to nullify the provisions of any State or territorial law which regulate or prohibit strikes by employees of a public utility, or which regulate or prohibit lockouts by a public utility." S. 169, 88th Cong., 1st Sess. (Jan. 14, 1963).

Appellee quotes a 1953 statement of Senator Taft that "I may say that we never intended any preemption of the field. The Supreme Court has gone beyond what we intend" (br. p. 49), and amicus Kansas City Power & Light Company quotes another statement of Senator Taft in the same hearing that "I do not offhand see why the State cannot handle a local public utilities strike, a streetcar strike, or anything else, as well as the Federal Government" (br. p. 16). The first remark pertained to preemption in general unrelated to the utility field, and the second remark was followed by Senator Taft's unquoted further statement that "I do not know whether we should turn that back to the States. Do you think there should be some legislation at least to stop this preemption doctrine?" Hearings before Senate Labor Committee on Proposed Revisions of the Labor Management Relations Act, 1947, 83d Cong., 1st Sess., 721 (1953). Thus, Senator Taft clearly recognized that the question was within the legislative domain; plainly acknowledged, by his statement that he did "not know whether we should turn that back to the States," that the States had no present power to act; and invited opinion as to whether legislation was needed. In any event, Senator Taft's post-legislative remarks are the kind of "subsequent legislative materials [which] are neither appropriate nor relevant guides to interpretation of prior enactments." *F.T.C. v. Sun Oil Co.*, 34 A.S. Law Week 4055, 4059, n. 11 (S. Ct., Jan. 14, 1963).

In short, the best that appellee can say is that it has mutilated but not destroyed the right to strike. But a federal right which does not brook its extinction cannot tolerate its crippling.³

2. What we have said answers appellee's related contention that it has merely engaged in selective suppression of the right to strike. The claim rests on its assertion that since the enactment of the King-Thompson Act, of the thirty labor disputes which it classifies as an actual or threatened utility strike, seizure was instituted in but nine (br. pp. 26, 46). The contention is irrelevant even if the representation is accurate. The employees represented by the Union have been forbidden to strike each of the three times they threatened to do so. Seizure swiftly followed each threat. For these employees suppression of the strike has been total. It is no answer to their protest to infringement of their right to strike to respond that others have been left alone. The same is true of every utility worker whose right to strike has been blocked by seizure. And even as to utility workers who have been allowed to strike, they never know that the axe may not fall on them. Those utility workers who have actually or potentially been prohibited from striking

³ Since it cannot show that the strike continues to exist as a viable, meaningful instrument, appellee has wholly failed to respond to the proposition that suppression of the strike, without substituting a compensating equivalent for it, is incompatible with the Fourteenth Amendment (br. pp. 51-53). And appellee's insistence that the abstract right to quit, despite circumstances which prevent its exercise, is enough to preclude involuntary servitude (br. p. 53), ignores the meaning "of freedom as 'the condition of being able to choose and carry out purposes.' This includes . . . the idea of actual ability with available means, or effective freedom to do what one wishes. . . ." Muller, *Freedom in the Western World*, xiii (1963).

have surely suffered the loss of their federal right. The wrong to them is not alleviated or excused because others are unmolested.⁴

Nor is it at all clear that the twenty-one strikes classified by appellee as "Non-Seizure Cases under the King-Thompson Act" (R. 197) are representative of a conventional utility strike to secure improved contract terms. Sixteen of these strikes, for the period through August 12, 1958, are described by the Missouri State Board of Mediation in *Twelve Years Under the King-Thompson Act, 1947-1959*, pp. 24-27 (1959), reproduced at pages 36-39 of appellee's brief in *Local No. 8-6, Oil, Chemical & Atomic Workers Union v. Missouri*, 361 U.S. 363. Of the sixteen, two do not seem to be within the coverage of the King-Thompson Act, since they apparently pertain to local cartage or over-the-road motor freight transportation (items 1, 4); nine appear to be strikes over grievances during the contract term, probably in contravention of an express or implied no-strike commitment, and hence probably unsanctioned by the bargaining representative (items 2-3, 5-7, 10, 13-15); and one was a strike over contract terms but unauthorized by the bargaining representative (item 8). This leaves four of the sixteen as authorized utility strikes to secure improved contract terms (item 9, 11-12, 16), and three of these four lasted one day or less (items 9, 12, 16). In short, through August 1958, of thirteen authorized utility strikes to secure improved contract terms, seizure was imposed in nine, yielding a suppression rate of 69 percent. This is suppression enough.

⁴ Cf. *Schneider v. Irvington*, 308 U.S. 147, 163: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

3. "Emergency" is appellee's claimed dominating justification—not just any kind of "emergency" but "[o]nly a particular, special kind of emergency," "sufficient to create a threat of imminent disaster" (br. p. 25). But the record shows without dispute, and appellee does not contest, that the principal component of the "emergency" was apprehension that a transit strike would substantially curtail retail sales in the downtown area of Kansas City, Missouri. (our brief, pp. 12-13, 37 and n. 6). Thus, translating appellee's rhetoric, impairment of retail trade spells "disaster." Evidently troubled that hyperbole and fact do not match, amicus Kansas City Power & Light Company notes that the existence in truth of an emergency as a result of a transit strike "is arguable," but to shore up the future quickly cautions that "collapse of gas or electric services" would indeed be "disastrous" (br. pp. 18-19). In the court below, presumably willing to scrap prohibition of a transit strike in order to prevent risking total invalidation of the seizure-no-strike device, amici representing The Gas Service Company were emphatic that "the record shows nothing more than minor public inconvenience and some reduction in downtown retail sales as a result of the interruption of transit operations" (br. p. 21).

These diversified positions expose the illusion that the label "emergency" is analytically meaningful. In a labor dispute "emergency" is a much bandied emotional catchword having greater political dimension than economic content.⁵ Once the momentum of its emotionalism is loosed it is extremely hard to contain. "The predilection for finding emergencies penetrates

⁵ Horlacher, *A Political Science View of National Emergency Disputes*, 333 *Annals Amer. Acad. Pol. Soc. Sci.* 85, 87-89 (1961)

the courts and the cloisters of scholarship, domains where objectivity is supposed to reign. It is not only present among the partisans and in the press, where the impulse to dramatize is difficult to resist." Congress in 1947 was fully aware both of the rightful claims which can be made and the inevitable excesses which can be incited in the name of emergency. Faced with the concrete need to choose among competing values, Congress drew the line at federal regulation of national emergency disputes by the 80-day injunction, and rejected the use of an emergency as a validating source of state intercession in a labor dispute. As this Court has said, at root are "debatable policy questions," but these "are for legislative determination and have been resolved by Congress adversely" to appellee. *Amalgamated Association*, 340 U.S. at 397.

4. It does not advance appellee's position for it to note that the Governor's opinion that jeopardy exists is subject to judicial review (br. pp. 43, 47). State entry into the field that Congress has occupied is not validated by making the state courts part of the scheme. Judicial review of an executive determination of jeopardy is in any event illusory. In the normal and predictable course of events, as this case illustrates, the Governor's proclamation is followed by an immediate restraining order in the event of a strike; a trial on the application for a temporary injunction is held about two weeks later; pending decision after trial the restraining order is continued in effect; final *nisi prius* determination is announced ten weeks after trial; and eight months after that the appeal is decided (our brief, pp. 13-14). It is highly unlikely that any *nisi prius* state court would find that jeopardy did not exist and

⁶ *Id.* at 87.

that the Governor erred in determining that it did, and notwithstanding an ostensible system of *de novo* review even more unlikely that an appellate court would hold that the *nisi prius* tribunal was wrong in its finding in view of the rule that the "judgment shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses" (R. 162). Cf., *United Steelworkers v. United States*, 361 U.S. 39; *United States v. National Marine Engineers' Beneficial Assn.*, 294 F. 2d 385 (C.A. 2). And no ultimate state court decision, if ever one should be made, that the strike should not have been illegalized because the requisite jeopardy did not exist, can ever result in restoring or vindicating the destruction of the strike for the period preceding the finding. In short, the state procedure itself is the source of the threat and injury to the federal right, and that threat and injury exists whether the state procedure is rightly or wrongly invoked by state standards. The federal right cannot be protected, its exercise free of state restraint cannot be vindicated, by any challenge, successful or not, to the state procedure on state grounds. The federal question goes to the validity of fastening the state procedure onto the employees at all, and the federal right fundamentally requires that it be totally free of the applicability of the state hamper.

5. Appellee asserts that the "Missouri statute is definitely not a 'comprehensive code for settlement of labor disputes'" (br. p. 44). Consideration of this argument necessarily invites examination of the statute in its entirety. Yet appellee resists this inquiry by its claim that the seizure-no-strike part is severable from the remainder of the statute (br. pp. 19-23). Appellee cannot have it both ways. It cannot claim that the

statute is not comprehensive and at the same time close its scope to scrutiny. Appellee's position is doubly untenable in that, except for relatively marginal aspects of it,⁷ the Missouri Supreme Court has validated the statute in its entirety. *State ex rel. State Board of Mediation v. Pigg*, 362 Mo. 798, 244 S.W. 2d 75; *Missouri v. Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309, 315, vacated, 361 U.S. 363. As this Court observed, the Missouri Supreme Court upheld "the constitutionality of provisions of the King-Thompson Act relating to the State Board of Mediation and public hearing panels. . . ." *Local No. 8-6, Oil, Chemical & Atomic Workers Union v. Missouri*, 361 U.S. 363, 367, n. 6. It is surprising that appellee should balk at defending what the Missouri Supreme Court has approved, particularly as, having pleaded that the King-Thompson Act lacks comprehensiveness, it has fairly put in issue the scope of the statute in its entirety.

6. Appellee startlingly relies upon *San Diego Building Trades Council v. Garmon*, 359 U.S. 236—the culminating expression of the preemption doctrine—invoking that language of the opinion which talks of allowance of state regulation of interests "deeply rooted in local feeling and responsibility . . ." (*id.* at 244) (br. pp. 32-33). But none of the cases cited to support the quoted statement include *Amalgamated Association*, and all the cases cited pertain to violent conduct. See

⁷ The Missouri Supreme Court has withheld decision upon the validity only: "of § 295.090, pertaining to a written labor agreement of a minimum duration and § 295.200, subparagraphs 2, 3, 4 and 5, relating to monetary benefits and loss of seniority." *Missouri v. Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309, 323, vacated, 361 U.S. 363. Having swallowed the elephant it is not likely to strain at the gnat.

also, *id.* at 247-248. When *Amalgamated Association* is cited (*id.* at 243, n. 1), it is to support the statement that "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting" (*id.* at 243). That is this case. And, manifesting the continuing and complementary vitality of each, *Amalgamated Association* and *Garmon* united to fashion the result in *In re Green*, 369 U.S. 689.

7. It is revealing that appellee relies explicitly upon the dissent in *Amalgamated Association* for its rationale (br. pp. 39, 40-41). But if the dissent is to become the law the transmutation is for Congress. Exclusion of state action because of congressional occupancy of the field requires only that Congress decide to withdraw in order for the States to enter. Congress has a free choice. Yet it has rejected repeated invitations to vacate the field (our brief pp. 60-68). Now more than ever before "[c]reation of a special classification for public utilities is for Congress, not for this Court." *Amalgamated Association*, 340 U.S. at 392-393.

* The other cases upon which appellee relies are as wide of the mark (br. p. 34). It requires a breathtaking *non sequitur* to equate this case with mutiny (*Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31), a sit-down strike (*N.L.R.B. v. Fansteel Metal Corp.*, 306 U.S. 240), or violence (*Allen-Bradley Local No. 1111 v. W.E.R.B.*, 315 U.S. 740; *I.A.W. v. W.E.R.B.*, 351 U.S. 266); *I.A.W. v. W.E.R.B.*, 336 U.S. 245, pertaining to unannounced, intermittent work stoppages for unstated ends, is "not concerned with a traditional, peaceful strike for higher wages" (*I.A.W. v. O'Brien*, 339 U.S. 454, 459), and its authority has in any event been virtually drained (*N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477, 493, n. 23; *San Diego Building Trades Council v. Garmon*, 350 U.S. 236, 245, n. 4).

II. MOOTNESS

It is conspicuous that, while urging that the controversy is moot, appellee does not disclaim an intention again to seize the Company in the event of another strike by Union and by that act once more prohibit the strike for the period of seizure. Appellee states only that recurrence of seizure "is purely hypothetical, and in any event would depend upon facts which are presently not before this Court" (br. p. 17). But the Company has been thrice seized upon a threatened strike by the Union, and no differentiating facts have been suggested or exist warranting the slightest assurance against a fourth turn. There is here no discontinuance of a course of conduct but a mere lull in an unabandoned course of conduct. This Court's recent statement applies therefore *a fortiori* to the instant situation: "... the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long-standing. For if the case were dismissed, as moot appellants would be free to return to . . . [their] old ways." *Gray v. O'Hear*, 31 U.S. Law Week 4285, 4287 (S. Ct. March 18, 1963). Appellee has not begun to sustain its "burden," a "heavy one," to show that "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633.⁹ Furthermore, appellee's asseveration that seizure is "temporary" (br. p. 13) gives vivid relevance to the short term order doctrine. That doc-

⁹ *Amicus Laeble* (br/pp. 11-12) cites *Commercial Cable Co. v. Burkison*, 250 U.S. 360, to show that release of seizure terminates the controversy over its legality, but in that case wartime possession of the cable lines was ended after the cessation of hostilities, and obviously resumption of war in 1919 was too attenuated a possibility to prevent mootness.

trine applies precisely to prevent a merry-go-round of exercise of governmental power sustained long enough to exert its influence but not sufficiently long to determine its validity.¹⁰

The presence of these classic indicia of a living case—recurrence and a short term order—undercuts appellee's contention that no "subject matter is presently in existence upon which the judgment of this Court can operate" (br. p. 14). The subject matter in vibrant being is the continuing unabated controversy between the parties over the power of the State upon a threatened or actual strike by the Union against the Com-

¹⁰ *Amicus Laclede* (br. p. 9) would distinguish the short term order doctrine on the ground that it pertains to a "quick, 'ex parte' administrative order. . . ." We are not aware that a short term administrative order is issued without preceding notice and hearing. The short term ICC order in *Southern P. Terminal Co. v. I.C.C.*, 219 U.S. 498, the father of the doctrine, was issued after complaint, answers, "full hearing," and report (*id.* at 506-507). But even if a short term order be indeed "quick" and "ex parte," there is nothing quicker and more ex parte than institution of seizure by the Governor pursuant to the King-Thompson Act. It is preceded neither by notice, hearing, nor any other process, and without more it invalidates the strike. Judicial review of the Governor's determination of jeopardy in a proceeding to enjoin the strike, practically meaningless (*supra*, pp. 9-10), does not in any event distinguish the short term order doctrine, for that doctrine's precise purpose is to secure judicial determination of validity.

We take small comfort from the statement of amicus Kansas City Power and Light Company that the proceeding in *United Steelworkers v. United States*, 361 U.S. 39, "was processed from the filing of the complaint through the issuance of a decision by the United States Supreme Court in a total of eighteen days" (p. 6). In contrast to the gratifying speed in that case, in this case at this writing it has already taken seventeen months to travel the route, and we have no reason to suppose that our efforts at expedition would be more successful a second time round (see our brief p. 81, n. 25).

pany to prohibit the strike by seizure of the utility. The main object of the appeal is, not release from the particular injunction which is but a mere manifestation of the recurring wrong, but to be free from the fetters of a state procedure by which this or another injunction can be fastened on appellants. This Court's judgment affirming or reversing the judgment below on the merits would be addressed to this living controversy and would authoritatively adjudicate it. The force of the judgment of this Court reversing on the merits would operate on the subject matter of this dispute and would still it conclusively without any need for supplementary injunctive relief. Cf., *St. John v. Wisconsin Employment Relations Board*, 340 U.S. 411, 414-415. But if injunctive relief were deemed necessary, there is a presently pending suit in the United States District for the Western District of Missouri by the Union against the state officials seeking an injunction, an action brought to a standstill when the three-judge court at the State's behest abstained in deference to determination of the controversy via the state action (Jurisdictional Statement, pp. 45a-54a). This Court's judgment reversing on the merits would provide the predicate for further proceedings in the three-judge court if that were thought appropriate or necessary. Abeyance of the federal action in accordance with the State's request to defer to the state action followed by mootness of the state action by the State's own conduct would constitute procedural perjury. There is no doubt therefore that this Court's judgment on the merits has a viable subject matter upon which to expend its force.

Tacitly recognizing that cessation of a challenged practice by an offender cannot moot the controversy,

appellee would distinguish the settled rule by its assertion that the "instant situation is wholly unlike those in which a *defendant*, by discontinuing the conduct complained of, seeks to avoid the grant of affirmative relief to an injured plaintiff. Here, it was not the defendants (appellants) but the *plaintiff* (the State of Missouri) which sought relief and obtained an injunction" (br. p. 18, emphasis in original). Appellee invokes a sterile formalism unrelated to the reason for the rule. What matters is, not the title by which the contenders enter the lists, but what the fight is about. The fight in this case is about the validity of the State's action in prohibiting an actual or threatened strike by seizure of the utility against which the strike is called. This is the challenged practice which is at the heart of this proceeding however initiated. (Appellee's incapacity to moot the controversy by ceasing the practice stems from its role as the actor in perpetrating the wrong, not from its nominal position as plaintiff or defendant. The instant state action is not less viable than the deferred federal action because, as in the state action, appellee began as the plaintiff, and as in the federal action, as the defendant. As this Court has said, "that the government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy, or terminate its questions." *Southern P. Terminal Co. v. I.C.C.*, 219 U.S. 498, 516. And this thought may properly be elaborated to read "that the government is the respondent in resisting relief from a challenged action it inflicts, not complainant in seeking to impose the challenged action, does not lessen or change the character

of the interests involved in the controversy, or terminate its questions."¹¹

As a result of the three seizures of the Company's property the Union has been prevented by the State from striking for a total of two years and two months. To say that there is no existing controversy between the Union and the State defies reality. The supremacy

¹¹ Seeking to buttress appellee's contention, amicus Laeble (br. p. 10) invokes an out-of-context quotation from *Mills v. Green*, 159 U.S. 651, 654, repeated in *United States v. Hamburg-Amerikanische P. F. A. Gesellschaft*, 239 U.S. 466, 477, that "if the intervening event is owing, either to plaintiff's own act, or to a power beyond the control of either party, the court will stay its hand." But "plaintiff's own act" referred to in the quotation pertains, not to cessation by plaintiff of a challenged act if perpetrated, but to other conduct by plaintiff having no relevance to the instant case. This Court illustrated the presently irrelevant kind of "plaintiff's own act" by its listing of the type in *Mills v. Green*, 159 U.S. 651, 654: "For example, appeals have been dismissed by this court when the plaintiff had executed a release of his right to appeal . . . ; or when the rights of both parties had come under the control of the same persons . . . ; or when the matter has been compromised and settled between the parties . . . ; or when pending a suit concerning the validity of the assessment of a tax, the tax was paid . . . ; or the amount of the tax was tendered, and deposited in a bank, which by statute had the same effect as actual payment and receipt of the money."

In *Mills v. Green*, 159 U.S. 651, 657, where the "whole object" of plaintiff's bill "was to secure a right to vote" at a particular election, the mooting event was the actual conduct of that election before the right to vote in it could be decreed. Contrast *Giles v. Harris*, 189 U.S. 475, 484, where plaintiff sought registration as a voter; and the passing of the date of a particular election did not moot the bill, for its "principal object" was "to obtain the permanent advantages of registration. . . ." In *United States v. Hamburg-Amerikanische P. F. A. Gesellschaft*, 239 U.S. 466, the mooting event was the advent of World War I. For war and its cessation as a mooting event in general, see *Diamond, Federal Jurisdiction To Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 144-145 (1946).

of law in a federal system demands this Court's determination of the question whether a claimed federal right exists and has been abridged. The time for decision is now.

Respectfully submitted,

BERNARD CUSHMAN
5025 Wisconsin Ave, N.W.
Washington 16, D. C.

BERNARD DUNAU
912 Dupont Circle Building
Washington 6, D. C.

JOHN MANNING
3333 Warwick Boulevard
Kansas City, Missouri

Attorneys for Appellants

April, 1963.